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APPLICATION OF THE DOCTRINE OF RES ADJUDICATA TO HABEAS CORPUS PROCEEDINGS.

An honored correspondent from the state of Texas sends us an interesting query on a state of facts involving the application of the doctrine of *res adjudicata* to *habeas corpus* proceedings. The question being one of great importance we are inclined to consider it quite generally and altogether independent of the particular facts stated by our correspondent.

The statement is often to be found in text books and judicial opinions that the doctrine of *res adjudicata* has no application to *habeas corpus* proceedings, and that a refusal to discharge on one writ is no bar to the issuance of a new writ. This statement is in entire harmony with the rule at common law. *Ex parte* Partington, 13 M. & W. 679; King v. Suddis, 1 East, 306, Leonard Watson's Case, 9 Ad. & El. 731. In the first case cited, Lord Kenyon held that a prisoner might in a *habeas corpus* proceeding seek a discharge from confinement or the opinion of every court in the kingdom, having proper jurisdiction, as to the propriety of his imprisonment. The reason for this rule seems to be found in the nature of the writ itself. It has been called the "writ of liberty" and therefore one which is to be surrounded by no hedges or difficulties. The citizen's liberty is priceless and he is to have every opportunity to regain it. He would therefore seems to be entitled to successive writs *ad infinitum*, however intolerable may be the expense and inconvenience to the state and its officers. Another reason assigned is that it is not a final judgment from which an appeal will lie, and therefore cannot conclusively bind the parties thereto. On one reason or another, however, the rule itself has been adopted in many of the states in which the question has arisen for adjudication. Weir v. Marley, 99 Mo. 484, 12 S. W. Rep. 798; *In re* Blair, 4 Wis. 522; People v. Brady, 56 N. Y. 182; *In re* Snell, 31 Minn. 110, 16 N. W. Rep. 692; *In re* Ring, 28 Cal. 247; Maria v. Kirby, 51 Ky. 542.

A contrary view to the one just announced is rapidly gaining ground. The reason for the old rule at common law has been so ridiculed by text writers and jurists that it is no longer able to sustain a respectable argument in favor of the old practice. Mr. Van Vleet in his work on Former Adjudication, p. 93, says: "Under the common law as administered in England, if one judge refused to discharge a prisoner on his petition for a writ of *habeas corpus*, he could apply to another, and so on, until he had taken the opinions of all the judges accessible. The reason given, namely, that such procedure was favorable to liberty, was a strange one. If that were sound, then he ought to have been granted a new trial after a conviction before one judge, and so on, until they had all passed upon his guilt. A still more favorable thing to liberty would be no arrest nor trial at all." Again in the vigorous opinion of Bleckley, J., criticising the old common-law rule, in the case of Perry v. McLendon, 62 Ga. 598, we have these words: "It would seem from the authorities, or some of them, that there may be one writ of *habeas corpus* after another *ad infinitum*. But if there can be a review, is there any reason why the first adjudication, if acquiesced in, should not be final and conclusive? We can think of none. Such is the general rule of law in other cases, and why cases of *habeas corpus* should not be included in its application we cannot perceive or divine. Is liberty so precious? A single judgment will serve to hang a man, if left to stand unreversed. He cannot have trial after trial to ascertain if he is guilty, and determine whether he is to be executed. One complete trial will carry him out of the world, and why should it not suffice to keep him in jail until some new right to a deliverance has arisen? Is the same alleged right to be investigated over and over, each time afresh, just as if no prior investigation had taken place? Is the grievance, real or supposed, of a prisoner the stone of Sisyphus which courts can never bring to a place of rest? and if called to lift it up the same hill as often as it rolls down must they comply? Doubtless there is an obligation to issue the writ of *habeas corpus* whenever, and as often as, it may be applied for; but when it appears on the return that the legality of the imprisonment has already been adjudicated, the production of that judgment is the end of controversy. Further writs may be applied for and issued, but to each

and all of them the one valid and subsisting judgment will be a conclusive answer as to any and all objections to the legality of the restraint which were embraced in the first petition, or which would and should have been embraced in it." This language we regard as a most accurate statement of the rule and its reason which most strongly commends itself to our judgment, and is supported by many respectable authorities. Perry v. McLendon, 62 Ga. 598; *Ex parte* Hamilton, 65 Miss. 98; Brook v. Logan, 112 Ind. 183; *Ex parte* Scott, 1 Dak. 140, 46 N. W. Rep. 512; *In re* Sneden, 105 Mich. 61, 62 N. W. Rep. 1009; *Ex parte* Nichols, 62 Miss. 158; Hibler v. State, 43 Tex. 197.

The federal courts are equally in confusion on this question. Thus one line of authorities hold that a decision by a federal court under one writ, refusing the discharge of a prisoner is no bar to the issuing of any number of other successive writs by any court or magistrate having jurisdiction. *Ex parte* Kaine, 3 Blatch. 1; Carter v. McClaughry, 105 Fed. Rep. 614. The other line of authorities hold that where the jurisdiction is clear, and the hearing full and fair, a proceeding under *habeas corpus* should be considered final. *Ex parte* Robinson, 6 McLean, 355; *Ex parte* Cuddy, 40 Fed. Rep. 62.

As to judgments in *habeas corpus* affecting the custody of children, the great weight of authority is in favor of making them *res judicata* as against all subsequent actions involving the same facts and circumstances. The leading case on this question was handed down by the same court which has so tenaciously clung to the old common-law rule in cases involving personal liberty. In the case of Mercein v. People, 25 Wend. (N. Y.) 64, the court declared the rule of law to be that an adjudication of a court of record or of an officer having authority to act in the matter on the question of the custody of an infant child brought up on *habeas corpus*, may be pleaded as *res adjudicata* and is conclusive upon the same parties in all future controversies relating to the same matter and upon the same state of facts. Senator Paige, in delivering the opinion, said: "Such unhappy controversies as these may endure until the entire impoverishment or the death of the parties renders their further continuance impracticable. If a final adjudication upon a *habeas corpus* is not to be deemed *res adjudicata*, the consequences will be lamentable. This favored writ will become an engine of oppression, instead of the writ of liberty." Other authorities follow the rule announced in this case. *In re* Sneden, 105 Mich. 61, 62 N. W. Rep. 1009; McConologue's Case, 107 Mass. 170; State v. Bechdel, 37 Minn. 360; Bonnett v. Bonnett, 61 Iowa, 199. We have already noticed that in the case of *In re* Snell, 31 Minn. 110, the Supreme Court of Minnesota upheld the old common-law rule refusing the application of the doctrine of *res adjudicata* to *habeas corpus* proceedings involving personal liability; but in the later case of State v. Bechdel, *supra*, proceedings to determine the custody of an infant child was held to be distinguishable. In the latter case the court held that the question was not that the child was restrained or deprived of his liberty, but that such restraint was in prejudice of the right of the petitioner to his custody, thus constituting the case really one of private parties contesting private rights under the form of proceedings in *habeas corpus*.

In the case of Weir v. Marley, 99 Mo. 484, the court refused to go to the extent to which this exception goes, and denied that any different rule applied to *habeas corpus* proceedings relating to the custody of infants than in other cases. The court laid down the general rule applicable to all cases as follows: "The principle of *res adjudicata* does not apply in cases of *habeas corpus* to judgments remanding the prisoner, nor to judgments discharging the prisoner, where a new state of facts, warranting his restraint, is shown to exist different from that which existed at the time the first judgment was rendered. It does apply however, to a judgment discharging a prisoner, where no such new state of facts is shown. The distinction thus made between judgments remanding, and those discharging the prisoner, grows out of the nature of the writ whose *raison d'etre* is the protection of personal liberty, and it loses none of its characteristics when used for the purpose of obtaining the custody of children." The court therefore held that the discharge of an infant from the custody of the petitioners on a previous hearing was a complete answer to their petition presented subsequently to another court for a like writ to recover that custody from the same

person to whom it was awarded on the previous hearing.

It is quite difficult to reconcile all the conflicting decisions and confusing expressions of opinion on this question by the courts of this country. One thing we believe to be settled by the tendency of the later authorities, *i. e.*, that the doctrine of *res adjudicata* is as clearly applicable, on reason and principle, to *habeas corpus* proceedings as to any other character of legal action. The general rule may be stated as follows: Whenever a final adjudication of an inferior court of record, or of an inferior court not of record, or of persons invested with power to decide on the property and rights of the citizen, is examinable by the supreme court, upon a writ of error or a *certiorari*,—in every such case, such final adjudication is conclusive upon the parties in all future controversies relating to the same matter. In nearly every state *habeas corpus* proceedings may be reviewed, by appeal, writ of error or *certiorari*, and in such cases there should be no doubt as to the application of the doctrine of *res adjudicata*. In states like Missouri where no appeal or writ of error is permitted the action of the court in *habeas corpus* proceedings would not seem to have any finality or conclusiveness about it whatever, and yet, the decision of the court in the case of Weir v. Marley, *supra*, holding a discharge in *habeas corpus* as conclusive, but a refusal to discharge, not conclusive, seems to rest the rule of law in that state on quite an unstable and illogical basis. It may also be considered as settled by the overwhelming weight of authority that, whatever may be the law as to proceedings for the release of prisoners from illegal confinement, in applications for the writ of *habeas corpus* to determine the custody of children, the doctrine of *res adjudicata* is fully applicable.

NOTES OF IMPORTANT DECISIONS.

TAXATION — EXEMPTION OF MUSICAL CONSERVATORY FROM OPERA HOUSE TAX.—Everything is taxed in these latter days from the right to do business to the privilege of enjoying a relaxation therefrom. There is one thing, however, which even a greedy legislature fears to lay its hands upon,—the right of education. Everything that tends to educate the people, such as expositions, world's fairs, etc., are by the stern fiat of public opinion exempted from the burdens that would usually attach to enterprises of a similar nature the object of which were not educational. In conformity with this general rule the legislature of North Carolina imposed a tax on opera houses but expressly exempted from such taxation all exhibitions or entertainments given for the benefit of educational objects. In the recent case of Markham v. Southern Conservatory of Music, 41 S. E. Rep. 531, the interesting question arose how far and under what circumstances music could be deemed an educational object. The question arose over the attempt to bring within the operations of the opera tax a certain conservatory of music, owning a hall in which it gave musical entertainments for the special benefit of its pupils and teachers, and charging a small admission to defray the expense of the performances. In rebuking this unholy attempt of the tax collector to discourage public exhibitions of the divine art of music when given for art's sake only, the court uses this strong language:

"Music may not be of divine inspiration, as many believe in their souls, and it may not be, as the great poet has said, that

> The man that hath no music in himself,
> Nor is not moved with concord of sweet sounds,
> Is fit for treasons, stratagems, and spoils,

—yet the day has long passed since it was denied a part in many of the educational systems of the age. It may not be so necessary to the practical side of life as is a knowledge of the "three R's," but from the standpoint of æsthetics it is regarded as probably the most beautiful in its effects of all the works of nature or of art. The purpose and object of the defendant institution, then, being educational at least, is it true that these entertainments are solely educational? We think it can be so said without any stretching of the law. It is agreed that they are held at a loss to the institution, and anticipated loss is counted on; that the admission price demanded of the pupil is very small, and that if in any case the receipts should exceed the disbursements for expenses the surplus would go towards buying music and music books for the pupils of the school. We see no means by which the stockholders of the company can be financially benefited by such entertainments. The advantages and benefits seem to be altogether with and for the pupils; and the pleasure enjoyed by others than pupils is merely incidental."

GAS — REFUSAL OF GAS COMPANY TO FURNISH GAS TO PRIVATE CITIZENS.—The question passed upon in the recent case of State v. Consumers' Gas Trust Co., 61 N. E. Rep. 674, is not a new one. In this case it was held that a natural gas company, which a city has permitted to lay its mains in the street to furnish its citizens with gas, cannot refuse to furnish gas to a citizen in front of whose premises the pipes were laid, on the ground that there was an unavoidable deficiency in the amount of gas produced by it, and that if it furnished gas to such citizen it would inconvenience other patrons. We cite this case because the apparent justice of the defendants' defense

leads some good lawyers to lose sight of the great controlling principle that vitiates it. The CENTRAL LAW JOURNAL, in previous issues, has undertaken to make this distinction clear, and it is a pleasure to note that the court in this case has relied very strongly on an article that appeared in the CENTRAL LAW JOURNAL several years ago. The argument and citations of the court are unanswerable. The court said:

"Appellee's contract is with the state, and its extraordinary powers are granted in consideration of its engagement to bring to the community of its operations a public benefit; not a benefit to a few, or to favorites, but a benefit equally belonging to every citizen, similarly situated, who may wish to avail himself of his privilege, and prepare to receive it. There can be no such thing as priority or superiority of right among those who possess the right in common. That the beneficial agency shall fall short of expectation can make no difference in the right to participate in it on equal terms. So, if appellee has found it impossible to procure enough gas to fully supply all, this is no sufficient reason for permitting it to say that it will deliver all it has to one class, to the exclusion of another in like situation. It is immaterial that appellee was organized to make money for no one, but to supply gas to the inhabitants of Indianapolis at the lowest possible rate. It has pointed us to no special charter privilege, and, under the law of its creation, certain it is that its unselfish purpose will not relieve it of its important duty to the public. The principle here announced is not new. It is as old as the common law itself. It has arisen in a multitude of cases affecting railroad, navigation, telegraph, telephone, water, gas, and other like companies, and has been many times discussed and decided by the courts; 'and no statute has been deemed necessary to aid the courts in holding that, when a person or company has undertaken to supply a demand which is affected with a public interest, it must supply all alike who are like situated, and not discriminate in favor of nor against any.' 45 Cent. L. J. p. 278; Haugen v. Water Co., 21 Oreg. 411, 28 Pac. Rep. 244, 14 L. R. A. 424; Olmsted v. Proprietors, 47 N. J. L., 311; Com. v. Wilkes Barre Gas Co., 2 Kulp, 499; Chicago & N. W. Ry. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; Nebraska Tel. Co. v. State, 55 Neb. 627, 634, 76 N. W. Rep. 171, 45 L. R. A. 113; Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. Rep. 1030, 63 Am. St. Rep. 841; Atwater v. Railroad Co., 48 N. J. L., 55, 2 Atl. Rep. 803, 57 Am. Rep. 543."

CORPORATION—COMPENSATION OF DIRECTORS FOR EXTRA SERVICES.—It has been thought to be a shrewd scheme to elect to the directorate of a corporation, at least one member of some legal attainments for the purpose of securing prompt and gratuitous advice on difficulties of law that are constantly presenting themselves in the management and transactions of corporations. The scheme, however, is not an altogether reliable one under the recent ruling of the Missouri Supreme Court, in the case of Taussig v. Railway Company, 65 S. W. Rep. 969. In this case the plaintiff, an attorney, and one of the incorporators, and subsequently a director of the defendant company, had, at the request of the incorporators, prepared the articles and performed other services in procuring the incorporation. At other times, at the request of the directors, he had performed services for the company which were entirely outside his official duties as a director. The court held that there being no understanding that the services were gratuitous, he might recover compensation from the corporation therefor.

It is certainly a well-settled rule of law that the directors of a corporation cannot recover compensation for their services when rendered in the line of their duty as such, whether *eo nomine* as directors, officers, members of committees, or otherwise, unless compensation for such services is provided for in its charter or authorized by a by-law or resolution of the board of directors before the services are rendered. Martindale v. Wilson-Cass Co., 134 Pa. St. 348, 19 Atl. Rep. 680, 19 Am. St. Rep. 706; Hodges v. Railroad Co., 29 Vt. 220; Beach v. Stouffer, 84 Mo. App. 395; Illinois Linen Co. v. Hough, 91 Ill. 63; Bank v. Elliott, 55 Iowa, 104; Smith v. Putnam, 61 N. H. 632; Pfeiffer v. Brake Co., 44 Mo. App. 59; Railroad Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; McMullen v. Ritchie, 64 Fed. Rep. 253; Blue v. Bank, 145 Ind. 518; Railroad v. Kase (Pa. 1898), 39 Atl. Rep. 301. There is a well-defined exception to this rule, however, where the services for which compensation is sought were of an extraordinary character or altogether outside of the scope of the director's official duties. The court in the principal case makes clear the distinction between the rule and its exception. The court said: "The plaintiff, an attorney at law, who is a director of the defendant corporation, is suing for the value of services, not within the scope of or incident to the duties of any of those official positions or relations, but for special personal services, strictly in the line of his profession, and entirely outside of the line or scope of any of his official duties. And the question is, what is the rule in such case? The rule applicable to such a case, to be deduced from the modern and best-considered cases, is, we think, that a party, although a director or other officer of a corporation, may recover the reasonable value of necessary services rendered to a corporation entirely outside of the line and scope of his duties as such director or officer, performed at the instance of its officers, whose powers are of a general character, upon an implied promise to pay for such services, when they were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for, or ought to have so intended and understood."

The authorities which sustain the exception, and the distinction insisted upon by the court in the principal case, are the following: Construction

Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. Rep. 36, 34 L. Ed. 608; Pew v. Bank, 130 Mass. 391; Bassett v. Fairchild, 132 Cal. 637, 64 Pac. Rep. 1082, 52 L. R. A. 611; National Loan Investment Co. v. Rockland Co., 36 C. C. A. 370, 94 Fed. Rep. 335; Brown v. Sliver Mines, 17 Colo. 421, 30 Pac. Rep. 66, 16 L. R. A. 426; Turnpike Co. v. Stratton, 120 Ind. 292, 22 N. E. Rep. 247; Association v. Meredith, 49 Md. 389, 33 Am. Rep. 264; Rogers v. Railway Co., 22 Minn. 25; Shackelford v. Railroad Co., 37 Miss. 202; Chandler v. Bank, 13 N. J. L., 255; Cheeney v. Railway Co., 68 Ill. 570, 18 Am. Rep. 584; Bank v. Elliott, 55 Iowa, 104, 7 N. W. Rep. 470, 39 Am. Rep. 167.

INSANE PERSONS—RIGHT TO NOTICE BEFORE ADJUDICATION OF INSANITY.—There is a dangerous tendency in making provisions for the inquisition or confinement of persons alleged to be insane, to dispense with notice of any kind upon the alleged lunatic, thus making the proceeding in many cases *ex parte*. The drift in this direction has been due in large measure to the recommendations of physicians. In some cities the ordinances permit the arrest of any person whose pecularities or eccentricities give any evidence of insanity, and his detention in what is termed an "observation ward" until his examination by the city physician. If the latter declares him to be of unsound mind he is sent to the asylum. Such is the effect of an ordinance in the city of St. Louis and perhaps in other cities. Their validity, so far as the writer has had opportunity to discover, has never been authoritatively passed upon, but that they are clearly a denial of due process of law and the constitutional right of personal liberty cannot be seriously questioned. In many states, however, the law does not go to that extent, but are quite often deficient in making provisions for notice. They provide for an adjudication which on the face of the statute seems to be purely *ex parte*. The tendency of the courts is to construe these statutes as implying notice and thus avoiding the alternative of declaring them void. Such was the character of the statute and its construction in the recent case of Jones v. Learned, 66 Pac. Rep. 1071. In this case the Supreme Court of Colorado held that although the statute providing for the inquisition of persons alleged to be insane did not in terms require notice to be served on the lunatics, that, nevertheless, such a notice would be implied and is indispensable irrespective of statute. We cannot find words to express our abhorrence and amazement at even the suggestion of a different rule. The celebrated story "Hard Cash" by Charles Reade, exposed the awfulness of the practice existing in England in the 18th century, under which persons perfectly sane were locked up in a mad-house for ulterior purposes on the recommendation of medical examiners subsidized for the purpose. The portrayal of the terrible injustice perpetrated under this system is so revolting to American sense of justice as well as to every principle of constitutional law as not to be countenanced for a moment, and the recommendation of every medical board in the United States could not change public sentiment on this question. Any person alleged to be insane is entitled to notice of any proceedings, the result of which may legally declare him to be of unsound mind and thus pass the control of his property and the liberty of his person into other hands.

The authorities are unequivocal on this question, and in no case is the law stated more clearly nor more forcibly than in that of Eddy v. People, 15 Ill. 386. In that case a party was adjudged a lunatic without notice. The statute at such time did not, in terms, require notice, but the decree was vacated because of the absence of this notice. The court, in ruling, said: "We are clearly of the opinion that, upon the general principles of law, the supposed lunatic is entitled to resonable notice. * * * Every principle of justice and right require that he should have notice, and be allowed to make manifest his sanity. * * * The idea is too monstrous to be tolerated for a moment that the legislature ever intended to establish a rule by which secret proceedings might be instituted against any member of a community, by any party who might be interested to shut him up in a mad-house, by which he might be devested of his property and his liberty without an opportunity of a struggle on his part. Other authorities to same effect: Chase v. Hathaway, 14 Mass. 222; Evans v. Johnson, 39 W. Va. 299, 19 S. E. Rep. 623, 23 L. R. A. 737, 45 Am. St. Rep. 912; Holman v. Holman, 80 Me. 139, 13 Atl. Rep. 576; McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280; Allis v. Morton, 70 Mass. 63."

ABBREVIATIONS—OF WHAT ABBREVIATIONS OF TIME AND PLACE THE COURTS WILL TAKE JUDICIAL NOTICE.—This being the age of electricity, it was to be expected that there should have arisen among the people of this day a certain spirit of nervous haste that chafes under delay and strives to do a hundred things in the same time it took our fathers to do any one of them. This evil tendency has crept insidiously into our correspondence. In the good old times when men had plenty of time, words and phrases were spelt out in full and sometimes useless letters added to a word to give it the appearance of respectability and solidity, such as "thorough" "phthisis," etc. Gradually the adherents of phonetic spelling forced us to chop off some of these useless letters, as for instance, in the word "programme," which we must now spell "program" and many other similar instances. Phonetic spelling, however, did not satisfy the burning desire to do an hour's business in a minute of time; so we fell to chopping the words in two, leaving out essential letters and forcing the reader to guess at their meaning. In course of time some of these abbreviations were used so generally that the idea sought to be conveyed was recognized more quickly by the abbreviation than by the word itself, showing conclusively that a word is nothing

but a sign for a thought and that any sign will do so that it is used generally and continuously. The tendency to abbreviate, however, had to stop somewhere, or else the entire language would be abbreviated and we would be in danger of returning to the prehistoric practice of expressing ourselves in pictures and hieroglyphics. The first check to this tendency was given by the courts when the attempt was made to compel the courts to give judicial notice to some of the abbreviated forms of speech. Some of these the court readily adopted as many of them had already taken the place of the original words themselves; others were rejected, while in case of a very few the courts are still divided in opinion. Of this latter class are certain abbreviations of time and place, a good instance of which is to be found in the recent case of *In re* Lakemeyer's Estate, 66 Pac. Rep. 961, in which the Supreme Court of California held that they would take judicial notice of the meaning of abbreviated phrase "Nov. 22, '97," since the words and figures used were such as were commonly used in their abbreviated form to designate time. In this case the court said: "The expression under consideration is entirely unambiguous, and, to every one familiar with the usage of the language it expresses the month, day, and year as clearly as though these had been written out in full. It is, or rather, during the century just expired, it was, the common usage, universally understood, to designate the year by the last two figures of its number, omitting the figures designating the century."

As regarding the abbreviations of place there has been some conflict of authority, especially as to the abbreviations of states. Thus "Ind." for Indiana was judicially noticed by the court in Burroughs v. Wilson, while in the case of Ellis v. Park, 8 Tex. 205, the court judicially denied any knowledge of the fact that "Mo." stood for Missouri. So, also, in a later Texas case the court refused to judicially recognize the abbreviated "La." as standing for Louisiana. In the late case of Miller v. Miller (S. Car. 1895), 21 S. E. Rep. 254, a like objection was made to the abbreviation "Ga." for Georgia.

As regarding abbreviations of time the courts have been more liberal, but even here have set a limit to the right to abbreviate. It has been well settled that courts will recognize the common and ordinary abbreviations of the name of the month of the year, as for instance, "Oct." for October, "Dec." for December, etc. Kearns v. State, 3 Blackf. (Ind.) 336; Cutting v. Conklin, 28 Ill. 503; Perdue v. Fraley, 92 Ga. 780. The common abbreviation used in expression of time, "A. D.," "A. M.," and "P. M." are also all recognized. Brown v. State, 16 Tex. App. 245; Commonwealth v. Clark, 4 Cush. (Mass.) 593; Hedderich v. State, 101 Ind. 564, 51 Am. Rep. 768. In the case of Succession of Robertson, 49 La. Ann. 868, 21 South. Rep. 586, 62 Am. St. Rep. 672, the court had under consideration an olographic will in which three figures of the date was printed and th other written. Leaving out the printed matter as absolutely null under the law the date appeared as follows: "December 12-2," meaning "1892." "In this case it will be noticed," says the court in the principal case, "that all that was left to designate the year was the last figure of the numbers, —that is, the number of the year in the decade without designating the decade of the century,—thus leaving the year to mere conjecture." We cannot understand why this latter argument would not apply with not much less force to the abbreviation '97. True, a man does not always live to be a century old, and yet there may be doubt as to the time when a certain man lived which doubt would be sufficient to throw his life into two centuries, so that the century itself might become as important as the decade. We believe the safest rule to be to insist upon the year being written in full, or, if abbreviated, to require evidence of the exact year intended by the abbreviation. The abbreviation of the year by cutting it in half and disregarding the century is too uncertain and inaccurate to require judicial recognition by the courts.

THE RELATIONS BETWEEN TELEGRAPH OR TELEPHONE COMPANIES AND RAILROADS.

The subordination of the right of way of railroad companies to the use of telegraph or telephone companies presents many questions of law that must necessarily prove of interest. Presenting in a measure at least the most direct and accessible route for the construction and maintenance of lines of poles and wires, the right of way of railroad companies would seem to offer at the same time the most convenient location for lines of telegraph or telephone. How far, then, may such right of way be subordinated to this use? To what extent, if at all, may companies or individuals engaged in the conveyance of messages by electricity acquire the necessary rights over and along the way of railroad companies? The primary question would seem to be as to the title of the railroad to the land to which this use is to be subjected. If the railroad be the owner in fee, then the matter may, with certain limitations, be considered as one involving simply the relations between one in whom the title to land is vested, and another seeking to acquire title to or an easement in such land. If, on the other hand, the railroad has itself merely such easement as the nature of its business requires, then the questions involved become necessarily more complex.

In the consideration of the first of

these questions it may be broadly stated that no telegraph or telephone company can acquire title to or easement in land for the construction of its lines of poles and wires only in one of two ways: first, by tender and payment of compensation therefor; second, by due process of law, in manner and form as prescribed by statute.[1] Where, however, the fee to the land in question lies in a railroad company, and such land was acquired for the purpose of or in the carrying on of the business of such railroad, the very nature of the pursuits of such a company would seem to indicate that other and more delicate questions of law might arise than those springing from the relationship between an ordinary fee holder and telegraph or telephone companies seeking to acquire such rights as are necessary to the construction of their lines of poles and wires. Leaving out of the question the limitations imposed in this connection upon railroad companies by statute, the following rule may be laid down. It is within the power of the legislature of a state to provide for the taking of the property of a railroad company for the use of a telegraph or telephone line provided just compensation be made therefor.[2] It must, however, be thoroughly understood that even under the authorization of the "Telegraph Act," passed by congress in 1866,[3] no telegraph company may construct its lines upon the right of way of a railroad company without compensation to the latter.[4] Where such legislative action has been taken, it must have been exercised with a due and proper regard for rights already vested, and so a statute providing for the assessment by arbitrators of the damage done a railroad company by the erection of telegraph or telephone poles and wires upon its right of way, and giving no remedy for the enforcement of such award, nor making any provision for an appeal therefrom in order that the question of the measure of damage may be had before a jury, is unconstitutional and void.[5] The underlying principle in such cases, where the railroad company has acquired the complete title to the land in question and stands in the position of the fee holder, would seem to be that inasmuch as special facilities were granted by the state to such company for the carrying on of its business, and such business is in its very nature public, it must remain in a measure under the control of the legislature, and to a certain extent at least subserve public good and improvement, where such subserviency would not injure its business nor detract from its public use or value.

It is not the general practice, however, for railroad companies to acquire title in fee. It may be said, generally, that where title to land is acquired by a railroad, either by grant from the state or under its power of eminent domain, only such property is vested in such company as is necessary for the proper exercise of its business; in other words, a railroad company in this respect merely acquired an easement in the land sufficient for the construction, maintenance and operation of the road, the fee remaining in the original owner and the land reverting to his possession if abandoned by such railroad. Under such circumstances the subjection of railroad right of way to the use of lines of telegraph or telephone presents questions more varied and complex. There can be no doubt that a telegraph or telephone line may be constructed upon the right of way of a railroad by the railroad or another, where this is done in good faith for the benefit of, and to facilitate the operation of, such road, since such use of the land is clearly within the original easement;[6] but where such lines are to be used for the general handling and transmission of business, the original owner would seem to be entitled to additional compensation as for a new burden upon the fee.[7] Beyond the facilities afforded by the construction and maintenance of lines of telegraph or telephone for the purposes of operating the road, no proper view of the matter can, by any possibility, construe such lines to be the proper or necessary equipment of a railroad, where they are to be utilized for commercial purposes.

Possibly no question, in the consideration of the relations between telegraph or telephone companies and railroads, has been as fertile of litigation as that of contract. It has been the custom generally, in the acquiring of the necessary rights for the construction and maintenance of lines of poles and wires upon

[1] A., T. & T. Co. v. Pearce, 71 Md. 535.
[2] S. W. R. R. Co. v. South. & Atl. Tel. Co., 46 Ga. 43.
[3] Act of Cong. July 24, 1866, ch. 230.
[4] A. & P. Tel. Co. v. C., R. I. & P. R. R., 6 Biss. (U. S.) 158.
[5] S. W. R. R. Co. v. South. & Atl. Tel. Co., 46 Ga. 43.
[6] Prather v. W. U. Tel. Co., 89 Ind. 501.
[7] A., T. & T. Co. v. Pearce, 71 Md. 535; W. U. Tel. Co. v. Rich, 19 Kan. 517.

the right of way of railroads, to expressly covenant that such grant shall be exclusive. As a general rule it may be laid down that a railroad company cannot grant to a telegraph or telephone company the exclusive right to establish lines upon such road.[8] It has been held that such contracts are void as against other companies accepting the privileges of the Act of Congress of 1866,[9] provided the lines of the second company do not obstruct or interfere with the lines of the company to which the use had first been granted.[10] Such contracts are not voidable but absolutely void, and an injunction will not issue restraining a second company from constructing its lines upon such railroad right of way.[11] In other words, while a telegraph company, having the grant of an exclusive right from a railroad company to construct its lines upon the right of way of such road, is entitled to an injunction as against actual interference with its lines, it is not so entitled by reason of the interruption of its business as a result of mere competition by other companies constructing similar lines along the right of way of the same railroad.[12] Nor can such an exclusive contract, even if otherwise valid, debar the state in the exercise of the power of eminent domain from authorizing the construction of another telegraph line over the right of way of the railroad making such contract.[13] It is not to be denied that upon this question some diversity of opinion would seem to exist. Considering the matter wholly as one involving the question of public policy, it has been held that an exclusive contract for a joint line between a railroad and a telegraph company, as far as the railroad can legally grant such an exclusive right, whereby the former agrees to discourage competition, is not contrary to public policy, either as to the grant of exclusive right of way or as to discouraging competition, and, going even further the court held that equity, under such circumstances, would enjoin the placing or maintenance of other poles and wires upon the right of way of such railroad.[14] It cannot be maintained that an exclusive right of way contract between a railroad and a telegraph company is generally void as against public policy.[15] A case is even to be found where it is held that, while in opposition to the Act of Congress of 1866, and so without effect stipulations in a contract as to right of way between a telegraph or telephone company and a railroad, wherein the latter agrees not to give any other company permission to erect similar lines along such railroad, nor to transport men or materials for any other telegraph or telephone company at less than regular rates, may be eliminated from such contract without impairing the other provisions thereof.[16] It would seem to be universally true that contracts between railroad and telegraph companies stipulating that all messages relating to business of the railroad as well as "the family, private and social messages of the executive officers of the railroad, shall be transmitted without charge," are void as immoral and against public policy, such contract may be rescinded at any time,[17] and equity will grant no relief under it.[18] Neither company, may, however, appropriate property of the other, acquired while such contract was in force without paying for the same.[19] Exclusive right of way contracts are also held to be void as being in general restraint of trade, and as tending to create monopolies.[20]

Granted that such contracts are void, another question has arisen: Can the railroad appropriate the poles and wires of the telegraph company? Upon this point the decisions would seem to be unanimous. The right of a telegraph company to maintain its wires along a railroad being dependent upon the true construction of an agreement, the railroad company will be

[8] W. U. Tel. Co. v. Nat. Tel. Co., 22 Blatch. (U. S) 108; W. U. Tel. Co. v. B. & S. W. Tel. Co., 11 Fed. Rep. 1.

[9] W. U. Tel. Co. v. Am. Union Tel. Co., 9 Biss. (U. S.) 72; W. U. Tel. Co. v. B. & O. Tel. Co., 19 Fed. Rep. 660.

[10] Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 19, and cases *supra*.

[11] Postal Tel. Co. v. W. U. Tel. Co., 50 Fed. Rep. 493.

[12] W. U. Tel. Co. v. Am. Union Tel. Co., 9 Biss. (U. S.) 72.

[13] New Orleans M. T. R. R. v. S. & A. Tel. Co., 53 Ala. 211.

[14] W. U. Tel. Co. v. Chicago & P. R. R., 86 Ill. 246.

[15] W. U. Tel. Co. v. A. & P. Tel. Co., 7 Biss. (U. S.) 367.

[16] W. U. Tel. Co. v. Kan. Pac. R. R. Co., 4 Fed. Rep. 284.

[17] 4 Fed. Rep. 284, *supra*.

[18] W. U. Tel. Co. v. Union Pac. R. R., 1 McCrary (U. S.), 418; A. & P. Tel. Co. v. Union Pac. R. R., 1 Fed. Rep. 745; Marshall v. B. & O. R. R., 16 How. (U. S.) 314.

[19] 4 Fed. Rep. 284, *supra*.

[20] W. U. Tel. Co. v. Am. Union Tel. Co., 65 Ga. 160.

restrained from removing the wires until after the right is adjudicated,[21] and the telegraph company will be protected by an injunction against the railroad company in the possession of a line of telegraph which it has constructed,[22] nor will equity permit the railroad company, after the work is done, to take advantage of the nullity of the contract and take the whole of the telegraph property.[23] In short, equity will not permit a railroad company to acquire property in the lines of telegraph or telephone companies, where such lines have been constructed under a contract for right of way therefore, and such contract, by reason of the terms or stipulations therein, proves to be, at law, null and void. In this connection it may be laid down as a general rule that the railroad, being itself *in flagrante delicto*, cannot acquire title by reason of the nullity of a contract to which it is a party.

Where such telephone or telegraph lines are constructed upon land abutting the right of way of a railroad company, but possessed in fee by an individual or corporation other than such railroad, the rights necessary to such construction must be acquired from such landowner in manner and form prescribed by law, and yet in this connection questions may arise to a great extent involving the adjoining railroad. The primary and perhaps the most important of these questions concerns itself with the trimming rights necessary to the proper maintenance of such lives. Under these circumstances no right can be acquired for the cutting or trimming of trees upon such right of way without the consent of the railroad. If, however, such trimming be done off the right of way but abutting it, upon whom does the liability in damages for fire, occasioned by sparks from the locomotive of such railroad, rest? Generally speaking, upon the railroad. The broad rule, as laid down in the case of Aycock v. Railroad,[24] is that where a railroad permits dry grass or leaves, or other combustible rubbish to remain near its track and this take fire from ignited sparks emitted from one of its locomotives which had no spark-arrester, and the fire is thereby communicated to the plaintiff's adjoining land, destroying timber, etc., such railroad is liable, inasmuch as the injury resulted from the negligence of the defendant company. No obligation rests upon the owner of property along the track to keep it in a condition to be always safe from fires that may be caused by sparks thrown from passing locomotives, the obligation is rather upon the part of the railroad company to utilize such new and improved appliances, and to exercise such due care and diligence as would preclude the possibility of fire being started in such manner.[25] Where the direct cause of the injury is the negligence of the company in starting the fire, the holder of the fee is not precluded from his recovery in damages against such railroad by reason of such remote contributory negligence, as leaving grass or brush along and abutting such railroad.[26] It has, however, been held in New York, in the case of Collins v. N. Y. C. & H. R. R. R.,[27] that the property being situated abutting the track of the railroad, and so constantly exposed to danger by reason of fire from passing engines, the owner must use such care as a prudent man would employ under the circumstances.

The question of contributory negligence necessarily enters largely into the consideration of such questions. If the landowner was in a position to have prevented any damage, of this nature, to his property without incurring unusual danger and made no effort to do so, it would be negligence *per se* and preclude his right of recovery.[28] So he cannot recover for damages to felled timber that he might easily and without danger have saved from destruction;[29] but it may be laid down that no landowner is guilty of contributory negligence because he fails to keep his adjoining land clear of combustible material; it is not his duty to do so.[30] It is purely a question of fact, and not

[21] A. & O. Tel. Co. v. P., G. & W. R. R., 8 Phila. (Pa.) 246.

[22] W. U. Tel. Co. v. Nat. Tel. Co., 22 Blatch. (U. S.) 108.

[23] W. U. Tel. Co. v. B. & S. W. R. R., 3 McCrary (U. S.), 130.. The questions arising out of exclusive contracts of this nature are, in some instances, covered by statute, *e. g.*, see W. U. Tel. Co. v. B. & O. Tel. Co., 22 Fed. Rep. 133; Tex. Rev. St. 1879a, 624; Postal Tel. Co. v. N. & W. R. R., 88 Va. 920, Virginia Code, sec. 1287.

[24] 89 N. Car. 321, followed in Owens v. R. R., 88 N. Car. 502. See also Troxler v. R. R., 74 N. Car. 377; Doggett v. R. R., 81 N. Car. 459.

[25] R. & D. R. R. Co. v. Medley, 75 Va. 499; D., L. & W. R. R. v. Salmon, 39 N. J. L. 299.

[26] Fitch v. R. R. Co., 45 Mo. 322; Morrissey v. Ferry Co., 43 Mo. 380.

[27] 5 Hun (N. Y.), 499, affirmed in 71 N. Y. 609.

[28] Eaton v. O. R. & N. Co., 19 Oreg. 391.

[29] T., P. & W. R. R. v. Pindar, 53 Ill. 447; C. & A. R. R. v. Pennell, 94 Ill. 448.

[30] P., C. C. & St. L. R. R. v. Jones, 86 Ind. 496; R. &

of law, as to whether recovery is barred by reason of contributory negligence, where he, or a telephone or telephone company acting under his license, permits dry limbs, brush, or other cumbustible material to accumulate and lie upon his land abutting the right of way of such railroad and such accumulation contributes to a fire occassioned by sparks from the locomotives of such railroad company.[31]

As to wire crossings over the tracks of a railroad company, the matter, in many jurisdictions, is regulated by statute;[32] such necessary permission being granted by the legislature.[33] Where, however, such special acts are not in force, the general acts governing the relations between telegraph or telephone companies and railroads would seem applicable.[34] It is no longer open to doubt that a railroad acquiring the right of way over and across the public highways acquires only sufficient easement therein for the passage of its tracks. If, therefore, the wire crossing of telegraph or telephone companies be wholly within the limits of the highway, no objection thereto, on the part of such railroad company, can be maintained. As to such crossings at points, other than those traversed by a public highway, other question would seem to be presented. If the statutes governing in the jurisdiction, within which such rights are sought to be acquired, permit condemnation of way by electrical companies of this kind, then the necessary rights might, it would seem, be acquired by a telegraph or telephone company without the consent of such railroad; if not, the matter would seem to be in doubt.

G. C. HAMILTON, LL. M.

New York, N. Y.

D. R. R. v. Medley, 75 Va. 499; Erd v. C. & N. W. R. R., 41 Wis. 65; Kellogg v. C. & N. W. R. R., 26 Wis. 223; Salmon v. D. L. & W. R. R., 39 N. J. L. 299.

[31] P., C. C. & St. L. R. R. v. Hixon, 79 Ind. 111; P. & R. R. R. Co. v. Schultz, 93 Pa. St. 341.

[32] See for example, Va. Code Supp. ch. LIV, sec. 1292a amended and re-enacted Gen. Acts Va. 1899-1900, ch. 966.

[33] See Gen. Acts. Va. 1899-1900 ch. 966.

[34] Ala. Civ. Code, sec. 1246; R. S. Ind. secs. 4166, 4187; Code N. C., secs. 2008-2013.

INTOXICATING LIQUORS — WOMEN AS BARTENDERS.

MAYOR, ETC. OF CITY OF HOBOKEN v. GOODMAN.

Supreme Court of New Jersey, May 9, 1902.

1. It is a valid police regulation of the sale of intoxicating drinks that women shall not be employed in connection therewith. Such a regulation is not a denial to women of the equal protection of the laws assured by the fourteenth amendment.

2. It is no ground of objection to such a regulation that the licensing of women as proprietors of places where intoxicating drinks may be sold is not also forbidden, or that the wife of a licensed male proprietor is allowed to sell or distribute such drinks.

COLLINS, J.: The plaintiff in *certiorari* was convicted before the recorder of the city of Hoboken for the violation of an ordinance, the validity of which is attacked by the present writ removing such conviction. The ordinance, which was approved July 25, 1901, forbids the employment in any public place where intoxicating liquors are sold of any female to sell, offer, or distribute spirituous, vinous, malt, or brewed liquors, or any intoxicating drinks or admixture thereof, or as "woman conversationalists," or for the purpose of attracting persons; and forbids the permitting of assembling of females in such a place for the enticing of customers or making assignations for improper purposes. It forbids any female, not having a license permitted by law, to sell, offer, procure, furnish, or distribute in any such place any such liquors or drinks, but provides that nothing therein "shall be so construed as to prevent the wife of any person having such a license from selling or distributing the aforesaid liquors." It prescribes a fine of $50 for its violation, and provides that no license to keep an inn or tavern or house of public entertainment, or for the sale of spirituous, vinous, malt, or brewed liquors in quantities less than one quart, to be drunk on or about the premises where sold, shall be granted, except upon the express condition that the licensee will not so employ any female or females, and that on convicted of violating any of the provisions of the ordinance the licensee, in addition to such penalty, shall forfeit his license.

It is next argued that the ordinance abridges privileges and immunities of citizens, and denies to those whose employment is prohibited the equal protection of the laws, because (1) it prohibits a citizen conducting a lawful business from engaging the services of females, (2) it prohibits females from engaging in a lawful employment, and (3) it makes an unjust and unreasonable discrimination between females. The keeping of a place of public entertainment where intoxicating drinks may be sold is not a matter of absolute right. In this state it has always been restricted, and the power of prohibition and regulation have without question been delegated to localities by direct vote or through representative municipal bodies. Sandford v. Court of Common Pleas, 36

N. J. Law, 72, 13 Am. Rep. 422; Paul v. Gloucester Co., 50 N. J. Law, 585, 15 Atl. Rep. 272, 1 L. R. A. 86. The subject has been considered as wholly within the police power of the legislature. When delegated, the power of regulation is limited only by the implication that it shall be exercised reasonably for the public good. Brown v. Murphy, 51 N. J. Law, 250, 17 Atl. Rep. 157. This view is supported by the Supreme Court of the United States in a long line of decisions, rendered both before and after the adoption of the fourteenth amendment to the federal constitution, upon which, chiefly, the plaintiff in *certiorari* relies. The following citations will suffice to establish at least that the sale of intoxicating drinks at retail is not one of the privileges or immunities of citizenship; that it may be entirely prohibited; and that its regulation, when permitted, is at the discretion of the several states: Bartemeyer v. Iowa, 18 Wall. 129, 21 L. Ed. 929; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. Ed. 205; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. Ed. 620; Giozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. Rep. 721, 37 L. Ed. 599. Women may, constitutionally, be barred from occupations that are subject to license. Bradwell v. Illinois, 16 Wall. 130, 21 L. Ed. 442; *In re* Lockwood, 154 U. S. 116, 14 Sup. Ct. Rep. 1082, 38 L. Ed. 929. It has not been argued but that the prohibitions of the ordinance in question are within fair police regulation. The only adjudged cases cited to us support them. Bergman v. Cleveland, 39 Ohio St. 651; *In re* Considine (C. C.), 83 Fed. Rep. 157. The objection is that of discrimination. It is pointed out that the wife of a licensee may be employed in the place where the employment of other women is forbidden, and that women are not debarred from proprietorship under license. That classes of women are privileged works no injury to others; but, apart from that, it seems to me that there is just ground for the discrimination of this ordinance. The supposed evil aimed at is the employment of women in connection with a traffic likely to induce vice and immorality. The wife of a proprietor of a place of public entertainment is not, in any fair sense, an employee, and her presence may fairly be deemed to be deterent of impropriety. The policy of licensing women as proprietors is questionable, but such licensees are not within the mischief which the ordinance seeks to remedy. We cannot say that the exceptions ought to nullify a regulation that we must concede is a wise one, namely, the debarring of women from forming part of the allurements of drinking places.

It is lastly urged that the conviction of the plaintiff in *certiorari* was unauthorized, because although the evidence discloses that customers in his saloon were served by bar maids in apparent employment there, he was not personally present on the occasions forming the basis of the testimony. The circumstances proved justified the finding that their presence was by his authority.

The conviction is affirmed, with costs.

NOTE.—*Validity of Laws Prohibiting the Employment of Women in Places Where Intoxicating Liquors are Sold.*—That the rights of women are being fully and extensively vindicated is seen by the struggle that is being made by herself and her interested partisans to prevent any encroachments upon her right, not only to life and liberty, but to her right to engage in business. The contention that a person cannot be restricted or otherwise limited in his natural rights, because of sex is undoubtedly substantiated both by reason and authority, but the validity and application of police regulations controlling the conduct of women and their employment in certain places is a question which the courts have not always found easy of solution.

It may be said that no legislature has been guilty of interfering with the rights of the gentler sex, merely on the ground of sex. Any seeming interference has always been attempted to be justified as a police regulation. But such attempts at justification will not always sustain a statute or ordinance which unreasonably interferes with individual liberty. Thus, in the recent case of Gastenau v. Commonwealth (Ky. 1900), 56 S. W. Rep. 705, it was held that a city ordinance declaring that it shall be unlawful for any woman to go in and out of a building where a saloon is kept for the sale of liquor or "to frequent, loaf, or stand around said building within fifty feet thereof," and providing for the punishment of any saloon keeper who shall permit a violation of that provision of the ordinance, is void, as being an unreasonable interference with individual liberty. The court said: "It seems to us that the ordinance in question is unreasonable, and an unnecessary interference with individual liberty, and tends to subject the vendor of liquors as well as citizens to unreasonable prosecutions. It might be that very good women could, for proper and legal purposes, find it necessary to go into a building where liquor was sold, or stop for a reasonable time within fifty feet of same; and, besides, we know of no rule of law which prohibits a well-behaved woman, for a lawful purpose, and in a lawful manner, from going into or near a saloon. If the citizens of Middlesboro choose to have saloons established where liquor is sold, it follows that all orderly and well-behaved persons have a right in an orderly manner and for a lawful purpose to visit such saloons." On the other hand, in the case of Bergman v. Cleveland, 39 Ohio St. 651, it was held that an ordinance which makes it an offense for the proprietor of a place where malt, vinous or spirituous liquors are sold, to employ females to serve his customers with such liquor was authorized by the statute conferring power on municipalities to regulate such places. The court considered this ordinance as a reasonable and proper regulation, and therefore as not infringing any provision of the state or federal constitution. In the case of State v. Reynolds, 14 Mont. 383, 36 Pac. Rep. 449, a statute was considered making it unlawful "for any person or persons, company or corporation, to sell or dispose of any spirituous, vinous or malt liquors in any room, hall, or other place where women or minors are employed or allowed to assemble for the purpose of the business therein carried on." In upholding the validity of this statute, the court says: "Petitioner's counsel urge the proposition that the provisions of this statute are unconstitutional because, in effect, it prohibits a certain class, *i. e.*, women, from being employed in a place where intoxicating liquors are sold, and therefore restrains such persons from engaging in a lawful em-

ployment. This statute does not forbid the employment of women or minors, but it does prohibit all persons and companies from selling intoxicating liquors in a place where women or minors are employed or assembled for the purpose of the business. There appears to be wisdom and propriety in this provision, as a police regulation, and we fail to find in it the infringement of any provision of our constitution." To same effect: State v. Consadine, 16 Wash. 358, 47 Pac. Rep. 755.

In California there is a certain provision of the constitution that has been a troublesome factor in the settlement of the question now before us. This provision prevents the legislature from disqualifying any person, because of sex, from pursuing any lawful business, vocation or profession. The supreme court has succeeded in evading this provision of the constitution by holding that it has no application "to the power of the state or its municipalities to prescribe the conditions upon which the business of retailing intoxicating liquors shall be permitted to be carried on, or in regulating the manner in which such business shall be conducted." *Ex parte* Hayes, 98 Cal. 555, 33 Pac. Rep. 337, 20 L. R. A. 701; *Ex parte* Felchlen, 96 Cal. 360, 31 Pac. Rep. 224; Foster v. Police Commissioners, 102 Cal. 483, 37 Pac. Rep. 763. These cases practically overrule the case of *Re* Maguire, 57 Cal. 604, 40 Am. Rep. 125, where it was held that this section of the constitution was violated by an ordinance making it a misdemeanor for a female to wait, or in any manner, attend on any person in any dance cellar, barroom, or in any place where malt, vinous or spirituous liquors are used or sold. On the face of things this latter decision is the most logical, but it fails to take into consideration that such an ordinance may not be intended to prohibit women from pursuing any lawful vocation on account of sex, but to discourage the immorality or indecency that would result from an association of the sexes under certain circumstances. Justice McKinstrey, in an opinion, concurring in the judgment, but not in the argument, cites as an illustration of this truth, a law prohibiting men from being employed as attendants in bathing establishments to which women alone had admission, or prohibiting women from being attendants at public baths which were frequented by men only.

Whether such statutes or ordinances violate the federal constitution was considered in the case of *Re* Consadine, 83 Fed. Rep. 157, where it was held that a state statute forbidding the employment of women in any saloon, beer hall, barroom, theater, or other place of amusement where intoxicating liquors are sold as a beverage, does not abridge the privileges and immunities of citizens, or deny the equal protection of the laws, within the meaning of the fourteenth amendment to the federal constitution, but is a valid exercise of the police power of the state. The court said: "This statute is general in its scope, and applies equally to all persons similarly situated; it is not, therefore, in any sense, partial or arbitrary. It was not enacted to do injury or work injustice. On the contrary, the intent of the legislature is manifest to check the tendency towards immorality of the association of the sex or in places of resort where intoxicating beverages are sold and where the worst passions are aroused."

CORRESPONDENCE.

ARE NATIVES OF JAPAN ELIGIBLE TO CITIZENSHIP UNDER THE NATURALIZATION LAWS?

To Editor of the Central Law Journal:

Dear Sir: Finding in your Journal, published May 30, an article discussing, in an elaborate manner, the case now before the supreme court of the state of Washington, involving the question of eligibility of Japanese for the citizenship in the United States, I am very much interested in the article, and it was great advice to me for drawing my brief. I send a copy of the brief now presented before the supreme court, believing that you are also interested in the case. I thank you very much for my liberty of quoting from your Journal. Very respectfully,

Seattle, Wash. T. YAMASHITU.

[The above is one out of many evidences of the practical value of the CENTRAL LAW JOURNAL to its readers. Mr. Yamashitu in his brief has adopted and extended in a very exhaustive and convincing manner the argument advanced by us in our editorial of May 30, 1902. The subject is one of general interest, but quite unusual and difficult.—Ed.]

JETSAM AND FLOTSAM.

THE ANTIQUITY OF LAW.

Several months ago the editor of the CENTRAL LAW JOURNAL had the pleasure of attending an address by the Hon. U. M. Rose of Little Rock, Ark., president of the American Bar Association, delivered at a banquet of the Law School Alumni Association of Washington University, given in his honor at the Planter's Hotel in the city of St. Louis. Judge Rose was in particularly good humor and bright flashes of brilliant rhetoric interspersed with the finest touches of humor charmed his audience for nearly an hour. He touched one chord which was responded to most generously,—his effort to illustrate the antiquity of law. Judge Rose said:

"Of all sciences the law is the most ancient. In our day the center of time has been shifted. Formerly we were told that the pyramids of Egypt were 4,000 years old; now archeologists say that they are 6,000 years old. Thus time seems to be growing at both ends.

Our professional retrospect has been lately extended in a most unexpected way. Prof. Hilpreth, of the University of Pennsylvania, in excavating the ruins of Nippur, in Mesopotamia, lately discovered the vault of an ancient firm of attorneys known as Murashu & Sons, who are supposed to have lived about 7,000 years ago.

We used to consider Abraham as one of the ancients; but now he appears to be painfully modern. Murashu & Sons were practicing law in Nippur 3,000 years before Abraham was born in Ur of the Chaldees, which, like Damascus, was of more recent date. They were farther removed from Abraham than we are from Romulus and Remus.

This vault of Murashu & Sons, buried under twenty-seven feet of cosmic dust, was found to contain legal documents inscribed on tiles, which had been deposited there for safe-keeping. One of these that was deciphered was a bill of sale of a ring with an emerald set, containing a guaranty that the set would not fall out for twenty years. The document is in the highest style of the art; and all that it lacks to make it valid is a United States revenue stamp. Doubtless the ring was intended to adorn some high-born lady, and to enable her to multiply or perpetuate her conquests. No better confirmation of the ancient saying that the written word remains. The lady and all of her lovely companions are faded and gone, and have long since been swept into the dust of oblivion. The city was destroyed ages ago, and yet the vault of these attorneys has guarded these precious documents intrusted to its care until a man from a world unknown has broken into its privacy and revealed its secrets. Murashu & Sons are by thousands of years the oldest members of the profession known to us; and they make, I think, a

good showing. This vault or archive room shows that they were prosperous in their professional pursuits; and its contents prove that they were esteemed and trusted. There is one thing that I suppose we shall know, and that is whether this particular document was written by the old man, or by one of the boys. The senior member was, we may suppose, a man of strong family affections, since he took his sons into business with him, and taught them the way in which they should go. We should cherish his memory; and I give the first watch of the night to the elder Murashu. As all of our ancestors were perhaps Asiatics in that early day, it may be that some drops of his blood now circulate in the veins of some of our most distinguished jurists, and we have evidence that some of the law of his day has trickled down through generations to our own times."

BOOK REVIEWS.

THE BARRISTER.

The Barrister consists of very interesting and amusing anecdotes of Tom Nolan, frequently called Counselor Nolan, late of the New York bar. No other practitioner ever succeeded, probably, in keeping the bench and bar in a laugh for so long a period of years as did Nolan. This book consists of amusing stories and many facts relating to his career which have heretofore been current only from mouth to mouth. On one occasion Mr. Nolan, having as assistant corporation counsel failed to convict an alleged offender for violation of an ordinance, thus gently suggested to the court his disapproval of the ruling:

"The decision of your honor reminds me of the famous verdict of an Irish jury: 'My Lord,' said the foreman in announcing the verdict, 'my Lord, we find the man who stole the mare not guilty.'" And another:

"'The barrister was trying a case before Judge Lawrence in the supreme court when he referred to a section of the code which he said would bear out his contention and enable him to win his case.

"'Kindly read the statute, counselor,' said the court.

"Nolan fumbled through a volume of the code and after looking in vain for the extraordinary authority he had quoted, said:

"'I cannot find it, your honor, but I have no objection to allowing your honor to find it. For this purpose I offer in evidence the three volumes of the statutes which I have here before me.'

"What action Judge Lawrence took in the matter has never been recorded." And this:

"The barrister having failed to win a case for a poor woman client, became oratorically pathetic and bewailed the lack of justice in this world. 'Me poor client,' he said, 'is little likely to get justice done her until the judgment day.'

"'Well, Counselor,' said the court, in the person of Judge Dugro, 'if I have an opportunity, I'll plead for the poor woman myself on that day.'

"'Your honor,' replied Nolan, 'will have troubles of your own upon that day.'"

The book is 12 mo., bound in cloth, contains 270 pages, compiled by Charles Frederick Stansbury. Published by Mab Press, 116 Nassau St., New York.

HUMORS OF THE LAW.

A lawyer, while bathing, was attacked by a shark. He managed to beat off his assailant and struggled back to shore. Once in safety on the beach he shook his fist at the retiring and disappointed shark, and gasped out: "You brute! That's the most abominable breach of professional etiquette I have ever known."

A retired sea captain and a lawyer, who were always at loggerheads, lived next door to each other. One very windy night the lawyer was reading a book in his study when a terrible crash upstairs startled him.

Upon investigating he found that a chimney had hurled itself through his roof, doing considerable damage, and soon discovered that it was the sea captain's chimney. Hastening down to his library he pulled out his law books and hunted up similar cases, devising and scheming how he could secure satisfaction from the detestable captain.

While thus engaged a note arrived from his enemy that read as follows:

"If you don't return those bricks at once I will put the matter in the hands of the law."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCOUNT, ACTION ON—Character of Account.—In an action for work and labor, a count stating that "plaintiff claims $225 due by account between plaintiff and defendants is not demurrable as failing to show the kind of account, since it will be taken as an open account.—Hartsell v. Masterson, Ala., 31 South. Rep. 616.

2. ADVERSE POSSESSION — Effect of Creating New County.—A patentee who actually settled on the land embraced in his patent was in possession to the extent of his boundary, and the subsequent creation of a new county including a part of the land did not interrupt this possession.—Kentucky Union Co. v. Cornett, Ky., 66 S. W. Rep. 728.

3. ALTERATION OF INSTRUMENTS — Burden of Proof.—Where heirs claimed that a note alleged to be a claim against the estate had been altered, the burden of proof was on them to show such alteration.—Jackson v. Day, Miss., 31 South. Rep. 536.

4. APPEAL AND ERROR—Bond.—A bond executed for the amount fixed by the court is good for a devolutive appeal, though insufficient for a suspensive appeal.—McSweeny v. Blank, La., 31 South. Rep. 636.

5. APPEAL AND ERROR — Excessive Judgment.—On reversal of a money judgment, where the only error is that the judgment is excessive, supreme court may name a sum which in its judgment would cure the error.—Hocks v. Sprangers, Wis., 89 N. W. Rep. 118.

6. APPEAL AND ERROR—Harmless Error.—Error in re-

fusing to permit a witness to answer a question is harmless, if it was answered by him in prior or subsequent testimony.—Louisville & N. R. Co. v. Banks, Ala., 31 South. Rep. 573.

7. APPEAL AND ERROR—Harmless Error.—Where it was evident that the judgment was based exclusively upon only one of two defenses relied on, errors referring exclusively to the other defense were harmless.—Robinson & Co. v. Hill, Ky., 66 S. W. Rep. 623.

8. APPEAL AND ERROR—Immaterial Evidence.—An appeal will not be dismissed because of absence from the transcript of evidence which could not influence the decision of the court.—Bendich v. Scobel, La., 31 South. Rep. 703.

9. APPEAL AND ERROR—Instructions.—As defendant did not ask an instruction presenting the question of fraud in procuring the policy, that question is not presented.—New York Life Ins. Co. v. Brown's Admr., Ky., 66 S. W. Rep. 613.

10. APPEAL AND ERROR—Motions.—Rulings on motions to strike pleadings can be presented for review only by bill of exceptions.—Randall v. Wadsworth, Ala., 31 South. Rep. 555.

11. APPEAL AND ERROR—Stenographer's Transcript.—A stenographer's transcript, sent up as a part of the record, cannot be considered, unless attested by the judge.—Mann v. Moore, Ky., 66 S. W. Rep. 723.

12. ARBITRATION AND AWARD — Water Rights.—Award in an arbitration of disputed water rights held to bind persons claiming under the parties thereto.—Horne v. Hutchins, N. H., 51 Atl. Rep. 651.

13. ARREST — Threatening Crime.—Under Code Cr. Proc. arts. 107-112, a city marshal has no right to arrest a person threatening to take the life of another.—Allen v. State, Tex., 66 S. W. Rep. 671.

14. ASSAULT AND BATTERY — Arrest.—In a prosecution against defendant for assaulting B while attempting to arrest him, evidence on defendant's part was admissible to show B's motive and conduct in making the arrest.—Spradley v. State, Miss., 31 South. Rep. 534.

15. ASSAULT AND BATTERY — Improper Liberties.—If a man takes improper liberties with the person of a female, without her consent, he is guilty of assault.—Walker v. State, Ala., 31 South. Rep. 557.

16. ASSIGNMENT FOR BENEFIT OF CREDITORS — Action on Bond.—An action by a creditor on the bond of an assignee for the benefit of creditors may be maintained in any state in which the surety on the bond is found given.—Hays v. Comstock-Castle Stove Co., Ark., 66 S. W. Rep. 649.

17. ATTORNEY AND CLIENT — Implied Contract.—A recovery on implied contract may be had on proof of knowledge of defendant that plaintiff was rendering services for her as her attorney, and that she expressed no dissent to their rendition.—Davis v. Walker, Ala., 31 South. Rep. 554.

18. ATTORNEY AND CLIENT—Meaning of Word "Recover."—A client who agrees to pay his attorneys one-half of what they "recover" is liable only for one-half of what he actually obtains by the judgment recovered.—Leslie v. York, Ky., 66 S. W. Rep. 751.

19. BANKRUPTCY — Assignment by Bankrupt.—Agreement between trustee in bankruptcy and party suing as assignee of the bankrupt to recover property from another, that, in case the assignee had judgment, he should be entitled to a certain sum and the trustee to the excess, held not fraudulent.—Simmons v. Richards, Tex., 66 S. W. Rep. 687.

20. BANKRUPTCY — Replevin.—Where defendant, as trustee in bankruptcy, took possession of goods as those of the bankrupt, they could not be taken from such custody by replevin in a state court.—Weeks v. Fowler, N. H., 51 Atl. Rep. 624.

21. BANKS AND BANKING — Receiver of National Bank.—A receiver of a national bank, coming into a state court to enforce a mortgage securing a bank debt, held subject to the laws of the state as to fraudulent mortgages.—Watts v. Dubois, Tex., 66 S. W. Rep. 698.

22. BENEFIT SOCIETIES—Widow's Right.—Widow of decedent leaving no personal estate except a funeral benefit certificate, that fund having been paid to the widow, she could not retain it as part of her distributive share, but must pay it on burial expenses.—Redmond's Admx. v. Redmond, Ky., 66 S. W. Rep. 745.

23. BILLS AND NOTES—Bona Fide Holder.—In an action by an indorsee in blank on a note executed and payable in Vermont, evidence held to require the submission to the jury of the issue whether plaintiff was a *bona fide* holder, as required by practice of Vermont.—Limerick Nat. Bank v. Howard, N. H., 51 Atl. Rep. 641.

24. BOUNDARIES — Agreement.—In an action of trespass *quare clausum*, in which plaintiff claimed to a certain line by virtue of an agreement with defendant's grantor, held proper to refuse to direct a verdict in plaintiff's favor.—Perry v. Hardy, N. H., 51 Atl. Rep. 644.

25. BOUNDARIES—Evidence.—On an issue as to boundary line, though deeds of both parties referred to plat recorded in county clerk's office, evidence showing the survey as marked on the ground held properly admitted.—McLane v. Grice, Tex., 66 S. W. Rep. 709.

26. BROKERS—Sale of Land.—Where a contract authorizing plaintiffs to sell defendant's lands within a certain period provided that defendant might sell all or any part of the land, such proviso did not authorize him to revoke their authority before the time expired, when they had excited an active demand and were rapidly selling.—McLane v. Maurer, Tex., 66 S. W. Rep. 693.

27. BUILDING AND LOAN ASSOCIATIONS—Right of Borrowing Member to Reopen Settlement.—In an action to reopen a settlement made with a building association and to recover usury paid, held error to dismiss plaintiff's petition upon the ground that she should be charged with her share of the losses of the business, where no effort had been made to ascertain them.—Olliges v. Kentucky Citizens' Building & Loan Assn's. Assignee, Ky., 66 S. W. Rep. 617.

28. CANCELLATION OF INSTRUMENTS—Possession.—Bill to cancel deed held not to show that complainant was in possession of the land when it was filed, and that it was therefore bad.—Galloway v. McLain, Ala., 31 South. Rep. 603.

29. CARRIERS—Duty of Passenger.—A passenger, in leaving a moving street car, which apparently was about to collide with a locomotive, was under no duty to tell the driver that she wished to alight.—Selma St. & S. Ry. Co. v. Owen, Ala., 31 South. Rep. 598.

30. CARRIERS—Exemplary Damages.—Where a railroad ticket is not good on a certain train, the refusal of the conductor to carry the holder does not entitle the latter to exemplary damages.—Yazoo & M. V. R. Co. v. Rodgers, Miss., 31 South. Rep. 581.

31. CARRIERS—Heating Depot.—A failure of a railway company to properly heat its depot waiting room in midwinter for the comfort of prospective passengers is *prima facie* evidence of negligence.—St. Louis, I. M. & S. Ry. Co. v. Wilson, Ark., 66 S. W. Rep. 661.

32. CARRIERS—Injury to Live Stock.—A carrier of live stock is not liable for injury to the stock, unless caused by his negligence; but, when negligence on his part is shown, the extent of injury is for the jury.—Louisville & N. R. Co. v. Wathen, Ky., 66 S. W. Rep. 714.

33. CARRIERS—Negligence.—A passenger held not negligent as matter of law in going onto car steps preparatory to alighting while the car was in motion.—Southern Ry. Co. v. Roebuck, Ala., 31 South. Rep. 611.

34. CHAMPERTY AND MAINTENANCE — Mortgages.—Under Code, §§ 2433, 2438, a quitclaim deed from a mortgagor after an illegal foreclosure sale passes the mortgagor's equity of redemption, and not a mere right to maintain suit for the fraud, and is not invalid as a species of maintenance.—Houston v. National Mut. Building & Loan Assn., Miss., 31 South. Rep. 540.

35. CONSTITUTIONAL LAW—Costs of Court.—A constitutional declaration that every person shall have ade-

quate remedy by due process of law does not take from the legislature the power to prescribe reasonable rules relative to costs incurred.—Grinage v. Times-Democrat Pub. Co., La., 31 South. Rep. 682.

36. CONTRACT—Breach.—Where a contract authorizing plaintiffs to sell lands fixes a minimum price, leaving the asking price to be agreed on, a complaint for breach of such contract which alleges that such price was agreed to is sufficient.—McLane v. Maurer, Tex., 66 S. W. Rep. 693.

37. CONTRACTS—Fraud.—Wife held not entitled to recover money paid out by her husband in an attempt to fraudulently obtain title to certain land, which he afterwards conveyed to her, on her title being set aside.—Hamblet v. Harrison, Miss., 31 South, Rep. 580.

38. CONTRACTS—Public Policy.—Notes given on promise not to prosecute for embezzlement held void as against public policy.—United States Fidelity & Guaranty Co. v. Charles, Ala., 31 South. Rep. 558.

39. CONTRACTS — Tax Warrants.—Payments of taxes made by town collector in pursuance of void contract held inoperative, so that delinquent taxpayer continued subject to arrest for non-payment of taxes.—Page v. Claggett, N. H., 51 Atl. Rep. 686.

40. CONTRACTS — Unauthorized Agent.—A contract by an unauthorized agent of defendant, of which defendant had no knowledge, not being binding on defendant, does not bind plaintiff.—Davis v. Walker, Ala., 31 South. Rep. 554.

41. CORPORATIONS — Appointment of Receiver.—The question whether a receiver should be appointed for a corporation is for the court.—Davies v. Monroe Waterworks & Light Co., La., 31 South. Rep. 694.

42. CORPORATIONS—Inspection of Books.—In an action by a stockholder against the president of a corporation for refusal to allow him to inspect the corporate books, where there is no bad faith, the damages are those which are the proximate result of the refusal.—Bourdette v. Sieward, La., 31 South. Rep. 630.

43. CORPORATIONS — Mismanagement. — A court will, where a petition by a stockholder shows gross mismanagement of the business of the corporation, interfere with the control of the directors.—Watkins v. North American Land & Timber Co., La., 31 South. Rep. 683.

44. CORPORATIONS—Stock.—Shares of stock in a corporation are personalty, though the property of the corporation consists almost entirely of real estate.—Champollion v. Corbin, N. H., 51 Atl. Rep. 674.

45. COSTS—Jurisdiction of Appellate Courts.—Appellate courts have jurisdiction over costs which depend on the event of the suit and are to be paid after its termination.—State v. Judges of Court of Appeals for Parish of Orleans, La., 31 South. Rep. 645.

46. COURTS—Conflicting Decisions.—Under Laws 1899, p. 170, to require a question to be certified to the supreme court by a court of civil appeals, the conflict between its decision and that of another court of civil appeals must be well-defined.—McCurdy v. Conner, Tex., 66 S. W. Rep. 664.

47. COURTS—Jurisdiction.—Where, in action for partition among the heirs, the property is valued at more than $2,000, the supreme court has jurisdiction, under Const. art. 85.—Succession of Magi, La., 31 South. Rep. 660.

48. COURTS — Jurisdiction. — Where plaintiff claimed $2,500 as value of property illegally seized and damages to the amount of $775, and the property was surrendered on the day the suit was filed, the amount in dispute being but $775, the supreme court is without jurisdiction.—Kaufman v. Cade, La., 31 South. Rep. 626.

49. COURTS — Mandamus. — Where it did not appear from the answer to a petition for a *mandamus* to compel a court of civil appeals to certify a question to the supreme court, as required by Laws 1899, p. 170, that the court had lost control of its mandate, it would not be held that the *mandamus* was not applied for within a reasonable time.—McCurdy v. Conner, Tex., 66 S. W. Rep. 664.

50. CRIMINAL EVIDENCE — Declarations of Conspirators.—Declarations of one before conspiracy held admissible against co-conspirator.—Hudson v. State, Tex., 66 S. W. Rep. 668.

51. CRIMINAL TRIAL—Absence of Witness.—Refusal to allow defendant in a criminal case time to put in writing a motion for a continuance on ground of absence of a witness held error.—Hattox v. State, Miss., 31 South. Rep. 579.

52. CRIMINAL TRIAL—Absent Witnesses. — Refusal to delay trial till a witness could be brought into court held not an abuse of discretion.—Wells v. State, Ala., 31 South. Rep. 572.

53. CRIMINAL TRIAL—Challenges.—Where challenge to a juror by the state for cause is sustained, the accused has no ground of complaint where he had not exhausted his peremptory challenges.—State v. Harris, La., 31 South. Rep. 646.

54. CRIMINAL TRIAL—Discretion of Trial Judge.—Refusal of new trial in criminal prosecution, sought for misconduct of jurors, held within the sound discretion of the trial judge, and not revisable by the supreme court.—Sanders v. State, Ala., 31 South. Rep. 564.

55. CRIMINAL TRIAL—Failure of Record to Show Place of Defendant.—Where defendant moved the court to instruct the jury to find him not guilty, and the instructions and verdict show that he was tried upon a plea of not guilty, there can be no reversal because the record fails to show the nature of his plea.—Griffin v. Commonwealth, Ky., 66 S. W. Rep. 740.

56. CRIMINAL TRIAL — Jury. — The jury are the sole judges of the weight of the evidence and the credibility of the witnesses.—State v. Washington, La., 31 South. Rep. 638.

57. CRIMINAL TRIAL—Matters of Discretion.—Refusal to allow withdrawal of plea of not guilty and interposition of plea in abatement is matter of discretion, not reviewable.—Davis v. State, Ala., 31 South. Rep. 569.

58. CRIMINAL TRIAL—New Trial.—A new trial granted on defendant's motion reopens the whole case and disposes of the plea of *autrefois acquit*.—State v. Washington, La., 31 South. Rep. 638.

59. CRIMINAL TRIAL—Previous Trial and Conviction.—The objection, on motion for a new trial, that the information informed the jury that there had been a previous trial and conviction, and new trial granted, comes too late.—State v. Gonzales, La., 31 South. Rep. 626.

60. DAMAGES—Excessive Verdict.—A verdict for $13,000 for the loss of an arm by plaintiff, who was 34 years of age and earning $1 a day, is excessive.—Louisville & N. R. Co. v. Lowe, Ky., 66 S. W. Rep. 736.

61. DAMAGES—Punitive Damages.—An instruction authorizing punitive damages for the obstruction by a railroad company of a passway across its road, where the company had acted in good faith and was merely mistaken as to its right, was error.—Louisville & N. R. Co. v. Carter, Ky., 66 S. W. Rep. 617.

62. DAMAGES—Violation of One's Legal Rights.—Violation by a person of the legal rights of another makes such person liable for damages, without proof of actual damage.—Bourdette v. Sieward, La., 31 South. Rep. 630.

63. DEATH—Former Marriage.—In a suit by the widow of a man killed, defendant's answer held sufficient to lay the foundation for the introduction of proof of a former marriage.—Albinest v. Yazoo & M. V. Ry. Co., La., 31 South. Rep. 675.

64. DEATH — Joinder of Actions.—A cause of action for pain and suffering cannot be joined with the statutory cause of action for death, and plaintiff must elect which he will prosecute.—Louisville Ry. Co. v. Will's Admx., Ky., 66 S. W. Rep. 628.

65. DEATH—Testimony.—In an action for the death of a railroad employee, a physician who described his injuries held properly allowed to testify as to whether, if

the accident occurred in a manner stated, it would have caused the sort of injury described.—Louisville & N. R. Co. v. Banks, Ala., 31 South. Rep. 573.

66. DEEDS—Parol Building Restrictions.—Vendee of property held not bound by parol restrictions as to character of buildings to be erected, where he had no notice thereof before making payment.—Standard Land & Building Co. v. Schanz, N. J., 51 Atl. Rep. 620.

67. DEEDS—Undue Influence.—A deed conveying land in consideration of the grantee's undertaking to support the grantor while he lived held properly set aside as obtained by undue influence.— Johnson v. Stone-street, Ky., 66 S. W. Rep. 621.

68. DEPOSITARIES—Receipt.—In an action to recover on a receipt for money, evidence held to show payment made to the depositor, and that the receipt was without consideration, and remained outstanding through carelessness on the part of the defendant's treasurer.—Moran's Heirs v. Societe Catholique d'Education Religieuse et Literaries de la Nouvelle Orleans, La., 31 South. Rep. 658.

69. DESCENT AND DISTRIBUTION—Debts Contracted After Death of Husband.—The heirs of a predeceased husband and father, who died without debts, are third persons *quoad* the succession of the lately deceased widow and mother, which is under administration to pay debts contracted by her, individually after the death of the husband.—Wilson v. Wilson, La., 31 South. Rep. 643.

70. DESCENT AND DISTRIBUTION—Decree of Distribution.—The heirs of a deceased cannot maintain an action to recover personalty belonging to deceased until a decree of distribution has entitled them thereto.—Champollion v. Corbip, N. H., 51 Atl. Rep. 674.

71. DESCENT AND DISTRIBUTION—Rights of Heir to Property.—An heir cannot maintain an action to recover the personalty of his deceased ancestor, in the absence of any showing that the property claimed is not necessary to pay the ancestor's debts.—Champollion v. Corbin, N. H., 51 Atl. Rep. 674.

72. DISCOVERY—Examination of Defendant's Books.—Plaintiff is not entitled as a matter of right to an examination of defendant's book to enable him to make sufficient allegations to sustain his action.—Lombard v. Citizens' Bank, La., 31 South. Rep. 654.

73. DISMISSAL AND NONSUIT—Garnishment. — Where plaintiff's right of contest of a garnishee's answer is determined against him, he may take a nonsuit before trial of the issue.—Baldwin v. Roman, Ala., 31 South. Rep. 596.

74. DISTRICT AND PROSECUTING ATTORNEYS—Appointment by Court.—Under Acts 1886, No. 74, a district judge can appoint an attorney to represent the state, when from any cause the district attorney is necessarily absent from the court, though not from the parish.—State v. Smith, La., 31 South. Rep. 563.

75. DOWER—Election.—The widow must elect whether she will take dower or homestead, as she is not entitled to both.—Redmond's Admx. v. Redmond, Ky., 66 S. W. Rep. 745.

76. DOWER—Widow's Right.—A widow is entitled to dower under Ky. St. § 2132, in land conveyed by her husband to another for the purpose of defeating her dower right.—Redmond's Admx. v. Redmond, Ky., 66 S. W. Rep. 745.

77. EQUITY—Departure.—An averment of a conclusion in a bill and a special prayer held not to affect the character of the bill, so that an amendment consonant with the facts alleged is not a departure.—McDonnell v. Finch, Ala., 31 South. Rep. 594.

78. EQUITY—Jurisdiction.—The want of averments of a jurisdictional fact in a bill for subrogation cannot be cured by admission of the fact in defendant's answer.—Tait v. American Freehold Land Mortg. Co. Ala., 31 South. Rep. 623.

79. EVIDENCE—Declarations of Mortgagor.—In an action by a receiver of a bank to foreclose a mortgage to secure a debt to the bank, the declarations of the mortgagor, after the execution of the notes secured, in the presence of the agent of the receiver, held admissible.—Watts v. Dubois, Tex., 66 S. W. Rep. 686.

80. EVIDENCE—Incompetency.— In an action on a partnership note against a surviving partner, his opinion that the note, to which his co-partner had signed the firm name, was executed for money borrowed to make a payment on land purchased by the latter, was incompetent, as was also his opinion that a mortgage had been given.—Warren Deposit Bank v. Younglove, Ky. 66 S. W. Rep. 749.

81. EVIDENCE—Interested Testimony.—The testimony of interested persons is binding, unless overcome by counter testimony or irreconcilable with the known facts.—Marks v. New Orleans Cold Storage Co., La., 31 South. Rep. 671.

82. EVIDENCE—Objection to Testimony.—In an action for the death of a railroad employee, who was run down by a yard engine, a question, propounded to the engineer, as to whether his engine was wantonly or recklessly propelled against decedent, was properly disallowed.—Louisville & N. R. Co. v. Banks, Ala., 31 South. Rep. 573.

83. EVIDENCE—Sale of Land.— Where a contract by which plaintiffs were authorized to sell defendant's land within a certain time was renewed, and certain changes then made by erasures and interlineations, testimony explaining such changes was competent.—McLane v. Maurer, Tex., 66 S. W. Rep. 693.

84. EVIDENCE—Set-Off.—Where, in an action for work and labor, defendants filed a plea of set-off, evidence of the amount claimed as such balance in a previous suit by defendant against plaintiff was admissible.—Hartsell v. Masterson, Ala., 31 South. Rep. 616.

85. EVIDENCE— Value.— Testimony as to number of times property was offered for sale under attachment before it was sold held admissible on issue whether it sold for its fair value.—Clewis v. Malone, Ala., 31 South. Rep. 596.

86. EVIDENCE—Value of Improvements.— Where the value of improvements on land was in issue, testimony of witness as to what he estimated the improvements to have cost, and that he did not think they had deteriorated much, held proper.—Smith v. Frio County, Tex., 66 S. W. Rep. 711.

87. EXECUTION—Notes.— A vendor of land who has transferred the lien notes held to have no interest in the land subject to sale under the execution.—Brotherton v Anderson, Tex., 66 S. W. Rep. 682.

88. EXECUTORS AND ADMINISTRATORS— Competency.—A testator may select his executor, and unless the selection is made from a class of persons which by common law or statute is excluded from appointment, the probate court cannot reject the person selected.—Farmers' Loan & Trust Co. v. Smith, Conn., 51 Atl. Rep. 609.

89. EXECUTORS AND ADMINISTRATORS — Foreclosure Suit.—On setting aside foreclosure sale, purchaser held entitled to be reimbursed for moneys expended by him for valuable improvements to the extent they add to the salable value of the land, to be set off by the reasonable rental value of the land from the time the owner was entitled to possession.—Bertram v. Ross, Ky., 66 S. W. Rep. 638.

90. EXECUTORS AND ADMINISTRATORS—Foreign Corporations.—Under Corporation Act 1901 (Pub. Acts pp. 334, 1348) §§ 2, 50, 51, a New York corporation authorized to transact a trust business, including that of acting as executor, cannot be appointed as executor in Connecticut.—Farmers' Loan & Trust Co. v. Smith, Conn., 51 Atl. Rep. 609.

91. EXECUTORS AND ADMINISTRATORS—Insurable Interest.—While a policy of life insurance assigned to one having no insurable interest cannot be enforced by the assignee, the assignment does not render the policy void.—New York Life Ins. Co. v. Brown's Admr., Ky., 66 S. W. Rep. 613.

92. EXECUTORS AND ADMINISTRATORS—Jurisdiction to Appoint.—In an action by a person claiming to be ad

ministrator, in which defendant denied that the county court which made the appointment had jurisdiction to do so, the question as to where decedent resided held for the jury on the evidence.—Jones' Admr. v. Illinois Cent. R. Co., Ky., 66 S. W. Rep. 609.

93. EXECUTORS AND ADMINISTRATORS—Notice to Corporation.—Knowledge of president of administrator trust company, who was also president of bank where funds were deposited, of the bank's insolvency, held knowledge of the trust company, in a controversy between it and the distributees of the estate.—Germania Safety Vault & Trust Co. v. Driskell, Ky., 66 S. W. Rep. 610.

94. EXECUTORS AND ADMINISTRATORS—Partition Suit. —An administrator can prosecute a suit for partition of property, owned in indivision by the succession he represents and third persons, on making the heirs parties. —Wilson v. Wilson, La., 31 South. Rep. 643.

95. EXECUTORS AND ADMINISTRATORS— Rents Before Assignment of Dower.—Under Ky. St. § 2138, providing that "the wife shall be entitled to one-third of the rents and profits of her husband's durable real estate from his death until dower is assigned," the widow is entitled to the gross rents during that time without deduction for taxes, insurance, or repairs.—Morton's Exrs. v. Morton's Exr., Ky., 66 S. W. Rep. 641.

96. EXECUTORS AND ADMINISTRATORS—Settlement of Estate.—Where there was no personal estate to be administered or debts to be paid, an action, by administratrix to settle her accounts was properly dismissed.— Redmond's Admx. v. Redmond, Ky., 66 S. W. Rep. 745.

97. EXCEPTIONS, BILL OF—Depositions Omitted.—Depositions read to the jury, and the record of another action read as evidence, being omitted from the bill of exceptions, cannot be considered as a part thereof.—New York Life Ins. Co. v. Brown's Admr., Ky., 66 S. W. Rep. 613.

98. FALSE IMPRISONMENT—Malice.— A wanton disregard of rights is enough to constitute malice in malicious arrest.—Gambill v. Schmuck, Ala., 31 South. Rep. 604.

99. FENCES Evidence.—In a prosecution for the destruction of the fence of another, a survey of lands not shown to be correct, and not made in conformity with Code, § 3895, held inadmissible in evidence.—Boyett v. State, Ala., 31 South. Rep. 551.

100. FIXTURES Permanent Improvements.—Improvements placed in defendant's side of a building, the upper stories of which were used in common by plaintiff and defendant, held not fixtures, but parts of the realty —Quimby v. Straw, N. H., 51 Atl. Rep. 656.

101. FRAUDULENT CONVEYANCES—Validity.—A mortgage to secure a *bona fide* debt, executed by an insolvent mortgagor with intent to hinder his creditors, held valid, unless the mortgagee participated in the fraudulent intent.—Watts v. Dubois, Tex., 66 S. W. Rep. 698.

102. GAMING Turf Exchange.—Under Const. art. 188, the question whether betting on races through the medium of the turf exchange is gambling is left to the legislature by the clear terms of the constitution.—City of Shreveport v. Maloney, La., 31 South. Rep. 702.

103. GRAND JURY — Validity of Indictment.—That the solicitor who appeared before the grand jury which returned an indictment might have been acting under an invalid appointment did not affect the validity of the indictment.—Kinnebrew v. State, Ala., 31 South. Rep. 567.

104. GUARDIAN AND WARD—Jurisdiction of Court.—Removal of guardian and ward outside the territorial jurisdiction of the court held not to terminate the jurisdiction after it has once been acquired by the granting of letters of guardianship.—Randall v. Wadsworth, Ala., 31 South. Rep. 555.

105. HOMESTEAD—Widow's Right.—The fact that the wife was not living with the husband at his death does not deprive her of the right to a homestead in property on which he made his home.—Redmond's Admx. v. Redmond, Ky., 66 S. W. Rep. 745.

106. HOMICIDE — Dying Declarations.—Where it is not disclosed that a foundation was properly laid for the admission of a statement as a dying declaration, a conviction will not be disturbed because of its exclusion.— Young v. State, Ark., 66 S. W. Rep. 658.

107. HUSBAND AND WIFE — Separate Estate.—Property devised to a woman for life, "to receive for her sole and separate use, and no other," the rents and profits thereunder, is her separate property, so that rents are not liable for husband's debts.—Sullivan v. Skinner, Tex., 66 S. W. Rep. 680.

108. INDICTMENT AND INFORMATION Variance.—Proof that stolen property, alleged in an indictment for larceny to have belonged to "John F. Hamilton," was the property of "John Houston," constitutes a fatal variance.—Spears v. State, Ark., 66 S. W. Rep. 660.

109. INSANE PERSONS Removal of Funds.—Petition by committee of non-resident lunatic to have funds coming to lunatic in New Jersey turned over to him refused under the facts, and funds held to await appointment of resident guardian. Brown v. Fox, N. J., 51 Atl. Rep. 621.

110. INTEREST—Action for Purchase Price.—Where the jury find for plaintiff in an action for the purchase price of goods, he is entitled to legal interest from the date of sale.—Schuwirth v. Thumma, Tex., 66 S. W. Rep. 691.

111. INTOXICATING LIQUORS — Evidence.—Where defendant was indicted for selling liquor, evidence that a judge and United States commissioners had advised him that it was not a violation of the law to do so was properly rejected. Hinton v. State, Ala., 31 South. Rep. 563.

112. INTOXICATING LIQUORS—Illegal Sale.—A dealer in liquors, doing business outside of prohibitory district, who there sells liquor, knowing that purchaser is buying it for resale in prohibitory district, held entitled to recover purchase price.—Bluthenthal v. McWhorter, Ala., 31 South. Rep. 559.

113. INTOXICATING LIQUORS—Minors.—A consent to sell liquor to a minor, given to the proprietor of a saloon, covers a sale made by him through his clerk, to whom the fact of consent was communicated.—Smith v. State, Ala., 31 South. Rep. 552.

114. INTOXICATING LIQUORS—Refusal of License.—Under Ky. St. § 4203, the county court did not abuse its discretion in refusing to grant a liquor license to one who had been selling liquor wishout license, and who further violated the law by selling to minors.—Appeal of Caudill, Ky., 66 S. W. Rep. 723.

115. INTOXICATING LIQUORS — Right to Withdraw Signature.—A person signing a petition to prohibit the sale of liquor has no right to withdraw his name from the petition without leave of court after it has been filed.— Bordwell v. Dills, Ark., 66 S. W. Rep. 646.

116. JUDGMENT Mortgage and Lease.—A judgment in favor of the lessee railroad against the lessor, rendered about five years before the property was restored to the lessor, by which it was in effect determined that the lessee had not then failed to keep the property in repair, constitutes no defense to the action for failure to turn over the property in good repair.—Louisville & N. R. Co. v. Schmidt, Ky., 66 S. W. Rep. 629.

117. JUDGMENT—Motion for New Trial.—Where facts vitiating a judgment are known at the time of a motion for a new trial, and not then urged, such facts cannot afterwards be set up collaterally to impeach the judgment.—Simmons v. Richards, Tex., 66 S. W. Rep. 687.

118. JUDGMENT—Sixty-Day Limit.—Under Ky. St. § 988, providing that a court of continuous session "shall have control over its judgments for 60 days," etc., the day on which the judgment is rendered must be counted as one of the 60 days.—Henry Vogt Mach. Co. v. Pennsylvania Iron Works Co., Ky., 66 S. W. Rep. 734.

119. JUDICIAL SALES—Bond.—Where the accepted bidder at a decretal sale had been warned before the sale to be prepared to execute bond promptly, the commissioner did not err in refusing to give him "a day or two" to look around to see if he could execute bond.— Carter v. Carter, Ky., 66 S. W. Rep. 624.

120. JURY—Challenges.—On a trial of the right of property between a mortgagee and the purchasers at an execution sale, the purchasers held entitled only to the challenges allowed to a single party.—Watts v. Dubois, Tex., 66 S. W. Rep. 698.

121. JURY—Charge.—The court, in charging the jury, held not required to make a brief presentation of the issues raised by the pleadings as a preface to the law embodied in the charge.—Galveston, H. & S. A. Ry. Co. v. Hitzfelder, Tex., 66 S. W. Rep. 707.

122. JURY—Recital of Special Venire.—The recital of the drawing of a special jury before the day set for trial in capital cases, as required by Cr. Code, § 5004, could not be omitted from the record on appeal, under section 4325.—Kinnebrew v. State, Ala., 31 South. Rep. 567.

123. JUSTICES OF THE PEACE—Failure to Execute Bond in Time.—*Mandamus* does not lie to compel a county judge to accept the bond of a justice, not tendered until after the first Monday in January succeeding his election.—Barnett v. Hart, Ky., 66 S. W. Rep. 726.

124. LANDLORD AND TENANT Oyster Beds.—Where lessee of state makes no stipulation concerning a cut-off from a bayou to other waters, while another takes a lease of the cut-off for the cultivation of oysters, the one lessee has no right to close such cut-off to the injury of the other, though he may find it prejudicial to the oyster beds on the property leased by him.—Bendich v. Scopel, La., 31 South. Rep. 703.

125. LIBEL AND SLANDER—Charging Infringement of Patent Laws.—Where suits were pending in a United States court, each party charging the other with a fraud against the patent laws, the question, in action for libel, as to who is the offender, must await the determination of the issue in such court as to who was the infringer.—C. S. Burt Co. v. Casey & Hedges Mfg. Co., La., 31 South. Rep. 667.

126. LICENSES—Revocation.—License to use stairway to reach a hall used by plaintiff and defendant in common held to have been revoked by the erection of a partition separating the portion of the hall belonging to plaintiff from that belonging to defendant.—Quimby v Straw, N. H., 51 Atl. Rep. 656.

127. LIFE INSURANCE—Right to Paid Up Policy.—The insured does not forfeit his right to a paid-up policy by failing to make demand therefor within the time stipulated in the original policy.—Washington Life Ins. Co. v. Miles, Ky., 66 S. W. Rep. 740.

128. LIMITATION OF ACTIONS—Failure to Sue.—The fact that the holder of a note failed to sue on it will not justify the inference that he consented to extend the time of payment, so as to affect the running of limitations, in the face of positive testimony to the contrary—Mutual Nat. Bank v. Coco, La., 31 South. Rep. 628.

129. LIMITATION OF ACTIONS—Water Course.—The daily pumping of water out of an intake well, and not its construction, held the proximate cause of a diversion of a stream, constituting a continuing nuisance, to which the statute of limitations does not apply.—Commissioners of Aberdeen v. Bradford, Md., 51 Atl. Rep. 614.

130. MANDAMUS—Consolidating Causes.—An order under Rev. St. art. 1454, consolidating pending causes involving title to realty, considered, and *mandamus* held not to lie to vacate it.—Halliburton v. Martin, Tex., 66 S. W. Rep. 675.

131. MANDAMUS—Demurrer.—Where petition for *mandamus* showed on its face that the act sought to be governed was not ministerial, it was not helped by the principle that a demurrer admits the facts.—Duvall v. Swann, Md., 51 Atl. Rep. 617.

132. MANDAMUS—Registration Officers.—*Mandamus* will not issue to compel a board of registry thereafter to be appointed to question an applicant for registration as to his ability to read, as required by Code Pub. Gen. Laws, art. 33, §§ 15, 16.—Summerson v. Schilling, Md., 51 Atl. Rep. 610.

133. MARRIAGE Parol Evidence.—Marriage may be proven by parol, or by any species of evidence which does not presuppose a higher species within the power of the party to produce.—Albinest v. Yazoo & M. V. Ry. Co., La., 31 South. Rep. 675.

134. MASTER AND SERVANT—Evidence.—In an action for the death of a railroad employee, who was run down by a yard engine, a rule of the company defining the proper position for at least one switchman when riding on such an engine held admissible. Louisville & N. R. Co. v. Banks, Ala., 31 South. Rep. 573.

135. MASTER AND SERVANT—Fellow-Servants.—A master who, after a servant was injured, undertook to take him to his home, but through the negligence of fellow-servants he was exposed, in consequence of which complications set in causing his death, is liable. Breshahan v. Lonsdale Co., R. I., 51 Atl. Rep. 624.

136. MASTER AND SERVANT—Fellow-Servants. Car inspector and men in charge of engine in railroad yard were not fellow-servants, and the master was liable for an injury to the car inspector from the negligence of the men.—Louisville & N. R. Co. v. Lowe, Ky., 66 S. W. Rep. 736.

137. MASTER AND SERVANT—Hospital Maintained by Employees. A railroad company held liable for injury resulting from its refusal to admit an injured servant to a hospital under its control, maintained by enforced contributions of its employee,—Illinois Cent. R. Co. v. Gheen, Ky., 66 S. W. Rep. 639.

138. MASTER AND SERVANT Punitive Damages.—A jury cannot assess punitive damages for the tort of a servant, unless they find that the wrong was in the line of the servant's duty and was willful, wanton, or malicious.—St. Louis, I. M. & S. Ry. Co, v. Wilson, Ark., 66 S. W. Rep. 661.

139. MASTER AND SERVANT—Safety of Appliances.—An employee has a right to rely on the judgment of his master as to safety of appliance furnished.—Louisville & N. R. Co. v. Richardson, Ky., 66 S. W. Rep. 631.

140. MONEY RECEIVED—Instructions.—In an action for money had and received, an instruction that money voluntarily applied on an existing indebtedness could not be recovered was properly refused, where the instruction did not except a payment by mistake or in ignorance of a material fact.—Hunt v. Matthews, Ala., 31 South. Rep. 613.

141. MORTGAGES—Laches.—A suit to redeem from an illegal mortgage foreclosure sale is not barred by laches, but only by the running of limitations, under Code, § 2731.—Houston v. National Mut. Building & Loan Assn., Miss., 31 South. Rep. 540.

142. MUNICIPAL CORPORATION—Appeal.—A board of mayor and aldermen, who officially represented a city in an appeal from their location, could not raise the objection that other interested parties were not notified.—Boston & M. R. R. v. City of Portsmouth, N. H., 51 Atl. Rep. 664.

143. MUNICIPAL CORPORATIONS—Cost of Curbing.—Under Ky. St. § 2835, in the original construction of a street, the cost of curbing is required to be apportioned to the front feet, though there was no sufficient space belonging to the city to permit a sidewalk.—Marshall v. Barber Asphalt Paving Co., Ky., 66 S. W. Rep. 734.

144. MUNICIPAL CORPORATIONS—Irregular Ordinance.—Where a license was levied under an irregular parish ordinance, and has been voluntarily paid, it can be recovered back only under exceptional circumstances—Fuselier v. St. Landry Parish, La., 31 South. Rep. 678.

145. MUNICIPAL CORPORATIONS—Special Assessments.—Const. art. 19, § 27, does not limit the power of a city, in making special assessments for park purposes, to the property which actually touches the park grounds—Matthews v. Kimball, Ark., 66 S. W. Rep. 651.

146. MUNICIPAL CORPORATIONS—Streets.—Under Pub. St. ch. 72, § 4, a discontinuance, leaving undisturbed the highway in front of an abutter's premises connecting

with the general system of streets, impairs no vested right, and furnishes no cause of action for damages.—Cram v. City of Laconia, N. H., 51 Atl. Rep. 635.

147. NEGLIGENCE—Discharging Hot Water into Gutter.—The question of defendant's negligence in discharging hot water into a gutter, whereby plaintiff, a boy of five years old, was scalded, was properly submitted to the jury.—Whitman McNamara Tobacco Co. v. Wurm, Ky., 66 S. W. Rep. 609.

148. NEW TRIAL—Discretion of Trial Court.—An application for new trial on the ground of surprise is peculiarly addressed to the discretion of the trial court, which will not be disturbed unless palpably abused, especially where the new trial has been granted.—Henry Vogt Mach. Co. v. Pennsylvania Iron Works Co., Ky., 66 S. W. Rep. 734.

149. NOVATION—Action for Purchase Price.—A third person, who assumes an account for purchase money of personal property due from the purchaser to the seller, is liable thereon in the same manner and to the same extent as the original purchaser.—Schuwirth v. Thumma, Tex., 66 S. W. Rep. 691.

150. PARTNERSHIP — Compensation for Services. — Where services performed by one partner for another were not in relation to the partnership business, the rule that one partner cannot recover for services in the absence of an agreement for compensation does not apply.—Lell v. Hardesty, Ky., 66 S. W. Rep. 643.

151. PARTNERSHIP — Proposed Corporation. — Action against agent of and stockholder in prospective corporation to reach land contracted to be turned over to corporation to pay suscription, to satisfy debt created by agent, sustained on theory of partnership between prospective members.—Friedman v. Janssen, Ky., 66 S. W. Rep. 752.

152. PAUPERS—Support. — The liability of towns and counties for the support of the poor is strictly statutory, and there can be no recovery without compliance with the statutory prerequisites.—Strafford County v. Rockingham County, N. H., 51 Atl. Rep. 677.

153. PAYMENT—Mistake of Fact.—A petition alleging that plaintiffs purchased from defendants certain lumber, represented as containing 704,000 feet and paid for on that basis, when in fact it contained only 574,000 feet, the prayer of the petition being for the excess paid under a mistake of fact, states a cause of action.—Edwards v. Fuson, Ky., 66 S. W. Rep. 715.

154. PHYSICIANS AND SURGEONS — Degree of Skill. — Physician is not liable for failure to exercise the highest degree of skill in his treatment.—McDonald v. Harris, Ala., 31 South. Rep. 548.

155. PLEADING—Argumentativeness.—In an action on an accident policy, a plea which simply states in an argumentative way the pleader's idea of the meaning of the policy, is bad.—Noble v. Travelers' Ins. Co., N. J., 51 Atl. Rep. 622.

156. PLEADING—Demurrer. — Where a good cause of action is defectively stated, the defect cannot be reached by demurrer.—Murrell v. Henry, Ark., 66 S. W. Rep. 647.

157. PLEADING—Inconsistent Defenses.—In an action to recover the price of an engine, the defenses of breach of warranty and settlement were not inconsistent, so as to require election.—Robinson & Co. v. Hill, Ky., 66 S. W. Rep. 623.

158. PLEADING—Special Plea.—A special plea setting up facts provable under the general issue is permissible.—Noble v. Travelers' Ins. Co., N. J., 51 Atl. Rep. 622.

159. PLEADING—Sufficiency.—A plea of partial failure of consideration, in an action on a sealed instrument reciting a consideration, is bad. Raritan R. R. Co. v. Middlesex & S. Traction Co., N. J., 51 Atl. Rep. 623.

160. PLEDGES - Lien.—Where bonds were pledged to a bank to secure a specific debt, the bank had no lien except for that debt. First Nat. Bank v. Germania Safety Vault & Trust Co., Ky., 66 S. W. Rep. 716.

161. PLEDGES—Notes.- One holding vendor's lien notes as collateral security, on a rescission by vendor and vendee, can enforce the note to the amount of the principal debt only. Brotherton v. Anderson, Tex., 66 S. W. Rep. 682.

162. PRINCIPAL AND SURETY—Concealment From Surety of Principal's Shortage.—Where a surety in a bond executed by M for the faithful performance of his duties inquired of plaintiffs whether M was keeping his accounts square, the failure of plaintiffs to disclose the fact that M was in default operated to release the sureties.—Frank Fehr Brewing Co. v. Mullican, Ky., 66 S. W Rep. 627.

163. PUBLIC LANDS - Collateral Proceedings. - A patent cannot be declared void in a collateral proceeding upon the ground that it embraces more land than it called for.—Allen v. Pulliam, Ky., 66 S. W. Rep. 722.

164. PUBLIC LANDS — Mandamus. — Under Laws 1902, *mandamus* will not lie to compel the issuance of refunding warrants to a patentee, though the same land has been previously patented by the state to other parties, where the patent is one issued by the secretary of state. - McClurg v. Wineman, Miss., 31 South. Rep. 587.

165. QUIETING TITLE—Disclaimer of Title.—In an action by the grantee to quiet title to land claimed to be embraced in the deed, in which defendant denied that he claimed the land and admitted that he had conveyed it to plaintiff, a judgment quieting title vests in plaintiff all of defendant's title.—Kentucky Union Co. v. Cornett, Ky., 66 S. W. Rep. 728.

166. RAILROADS—Proximate Cause.—Where a railroad company entices cattle to its track to feed on wasted cotton seed, it is liable for the death of a fireman caused by derailment of his engine, running over a cow.—Illinois Cent. R. Co. v. Seamans, Miss., 31 South. Rep. 546.

167. RECEIVERS - Acts of Agent.—A receiver of a national bank is bound by the acts and knowledge of his agent within the scope of the agency.—Watts v. Dubois, Tex., 66 S. W. Rep. 698.

168. REMOVAL OF CAUSES Parties to Action.—It seems that a motion by a non-resident defendant railroad company to remove a cause to the United States circuit court was properly overruled; defendant's conductor and engineer, who are residents of the state, being joined as defendants.—Jones' Admr. v. Illinois Cent. R. Co., Ky., 66 S. W. Rep. 169.

169. SALES Measure of Damages. - Upon the buyer's rejection in open market of lambs which the evidence shows were "top" lambs, the difference between the price at which they were sold and the contract price is the measure of damages.—Sanders v. Bond, Ky., 66 S. W. Rep. 635.

170. SALES—Measure of Damages.—Where an engine sold defendant failed to develop the agreed capacity, but he did not offer to return it, the measure of damages was the difference between the contract price and the market value at the time of sale.—Schuwirth v. Thumma, Tex., 66 S. W. Rep. 691.

171. SALES—Verdict.— Where, in an action to recover the value of goods and money delivered and charged to an employee of defendant, which plaintiff claims were in fact for defendant, and so charged merely for his convenience, a verdict which includes items which were clearly shown to be for such employee's own use should be set aside.—Shaw v. Gilmer, Tex., 66 S. W. Rep. 679.

172. SCHOOLS AND SCHOOL DISTRICTS — Paying Out School Funds.—Where a county treasurer has paid out the county school funds as apportioned by the county superintendant, and on his warrants, there is no liability on the treasurer's bond to a school district to which the superintendent erroneously failed to make an apportionment.—Oge v. Froboese, Tex., 66 S. W. Rep. 688.

173. SHERIFFS AND CONSTABLES— Bond.—There being nothing in the order of the county court appointing a deputy sheriff, or in his bond, which limited his service to any particular district, the bond covers all

collections made by him as deputy sheriff for his entire term.—Bates v. Smith, Ky., 66 S. W. Rep. 714.

174. SHERIFFS—Contract in Excess of Fees.—Under Pub. St. ch. 287, § 32, an agreement by which greater fees than the man allows are to be paid a sheriff by an attorney for serving writs and process cannot be enforced. —Edgerly v. Hale, N. H., 51 Atl. Rep. 679.

175. TAXATION—Suit by Revenue Agent.—A bill by the state revenue agent for the collection of taxes held to present a case within the jurisdiction of equity.—Adams v. Stonewall Mfg. Co. (Miss.), 31 South. Rep. 544.

176. TOWNS—Jurisdiction to Appoint Trustees.—Where a town lies in two counties, the county judge of either may appoint trustees; the jurisdiction continuing in the one first exercising the authority.—Yancy v. Town Fairview, Ky., 66 S. W. Rep. 636.

177. TRESPASS TO TRY TITLE — Burden of Proof.—The plaintiff in trespass to try title held to have the burden of proving that his location included lands claimed by defendant.—Clawson v. Williams, Tex., 66 S. W. Rep. 702.

178. TRIAL—Cross Petition.—It was not error to require a trial of the issue between the original parties to an action before the formation of an issue on a cross petition, filed by defendant.—City of Covington v. Huber, Ky., 66 S. W. Rep. 619.

179. TRIAL—Direction of Verdict.— In an action for personal injuries, where reasonable minds can draw no other conclusion that that there was an absence of negligence, a verdict for defendant is properly directed. —Flores v. Atchison T. & S. F. Ry. Co., Tex., 66 S. W. Rep. 709.

180. TRIAL—Jury's Sympathy.—Fact that in action for personal injuries plaintiff had epileptic fit in presence of jury held not ground for reversing verdict in his favor.—Galvestion, H. & S. A. Ry. Co. v. Hitzfelder. Tex., 66 S. W. Rep. 707.

181. TRIAL—Transfer of Cause.—Refusal to transfer to a chancery court a cause wherein defendant seeks to remove cloud cast on his title by certain fraudulent conveyances held erroneous.—Castle v. Hillman, Ark., 66 S. W. Rep. 648.

182. TRUSTS—Compensation.—The chancellor held authorized under the evidence to conclude that a commission stipulated for was to be the entire compensation of the trustee during the entire continuance of the trust.—Louisville Trust Co. v. Warren, Ky., 66 S. W. Rep. 644.

183. TRUSTS— "Heirs."—The word "heirs" in a deed construed, in connection with other provisions, and held to embrace, not only children of life tenant, but all descendants, so as to prevent taking by contingent remainder-man.—Rothenburger v. Peugnet, Ky., 66 S. Rep. 717.

184. TRUSTS—Refusal of Trustee to Accept.—The refusal of a town to accept a bequest in trust for cemetery purposes, unless the executor convey certain cemetery lots own by testator to it, does not authorize the executor to make such conveyance, nor entitle him to administer the trust fund as a part of the general estate.—Campbell v. Clough, N. H., 51 Atl. Rep. 668.

185. USURY — Sufficiency of Evidence to Sustain Defense.—Where, on the entry of final credits on the several notes sued on, only legal interest was collected, the defense of usury was not sustained; the charge of usury being expressly denied, and no evidence introduced in support of it.—Ludlow v. Ludlow & C. Coal Co., Ky., 66 S. W. Rep. 615.

186. VENDOR AND PURCHASER—Bona Fide Holder.—One acquiring title to vendor's lien notes for value and without notice held entitled to foreclose for amount of the notes, notwithstanding rescission by vendor and vendee.—Brotherton v. Anderson, Tex., 66 S. W. Rep. 682.

187. VENDOR AND PURCHASER—Reconveyance.—Where a decree foreclosing vendor's lien authorized reconveyance, and before reconveyance vendor sold improvements to one who removed them, acceptance of reconvevance held a waiver of a right of action against the purchaser.—Smith v. Frio County, Tex., 66 S. W. Rep. 711.

188. VENUE — Inconvenience. — Venue will not be changed on the ground of inconvenience, as against the right of plaintiff, where such inconvenience is slight.—Siamanton v. Moore, N. J., 51 Atl. Rep. 621.

189. WASTE — Estrovers. — A tenant of a particular estate may cut timber for estrovers and for clearing the estate for cultivation, so long as he leaves sufficient timber for the permanent use and enjoyment of the inheritance, but cannot cut the timber merely for the sale thereof. — Board of Sup'rs of Warren County v. Gans, Miss., 31 South. Rep. 539.

190. WATERS AND WATER COURSES —Fire Protection.— A city property owner may sue a water company for the destruction of his property by fire by reason of defendant's failure to maintain a water supply pursuant to its contract with the city.—Graves County Water Co. v. Ligon, Ky., 66 S. W. Rep. 725.

191. WATERS AND WATER COURSES—Overflowing Land. —A railroad constructing a side track without a ditch, which caused a swamp to overflow on adjoining lands, held not liable therefor; the use being reasonable. — Priest v. Boston & M. R. R., N. H., 51 Atl. Rep. 667.

192. WATERS AND WATER COURSES—Rights Conveyed.— Deed granting mill site and right to use of reservoir situated above the mill property held to pass only a right to a reasonable, and not exclusive, use of the reservoir.—Horn v. Hutchins, N. H., 51 Atl. Rep. 645.

193. WATERS AND WATER COURSES—Diversion.—In an action by a lower riparian owner for diversion of a stream, he may recover all damage that directly results by reason of the diversion, including any loss from permanent injury to the land.—Commissioners of Aberdeen v. Bradford, Md., 51 Atl. Rep. 614.

194. WATERS AND WATER COURSES—Right to Maintain a Ferry.—A riparian owner has no right without a license to maintain a ferry where a public road crosses a stream, but may do so at any other point on the stream.—Tuscaloosa County v. Foster, Ala., 31 South. Rep. 587.

195. WEAPONS—Metariality of Evidence.—In a prosecution for carrying concealed weapons, proof that defendant did not own a pistol, nor have one about his clothing at his home in the morning, held immaterial.— Norris v. State, Ala., 31 South. Rep. 551.

196. WILLS—Devise of Land.—Under Code 1871, § 2388, a devise of all of testator's land by generic description thereof, includes all the land answering such description at testator's death. — McRae v. Lowery, Miss., 31 South. Rep. 538.

197. WITNESSES—Against Deceased Persons.— Under Code § 1794, the administrator and heirs of a deceased party are not competent witnesses in a suit against the estate as to statements of deceased.—McDonald v. Harris, Ala., 31 South. Rep. 548.

198. WITNESSES—Against Deceased Persons.— A surviving partner was not a competent witness for himself as to the purpose for which a note was executed by the deceased partner in the firm name.—Warren Deposit Bank v. Younglove, Ky., 66 S. W. Rep. 749.

199. WITNESSES—Cross-Examination.— Refusal to require witness for the prosecution in a murder case to state, upon cross-examination, with whom she lived, held error.—Trabue v. Commonwealth Ky., 66 S. W. Rep. 718.

200. WITNESSES— Privilege from Arrest. — The arrest of a citizen of another state while in attendance as a witness before a referee is illegal, and his right to a discharge under Pub. St. ch. 221, §§ 10, 12, is not waived by his giving bail. — Dickinson v. Farwell, N. H., 51 Atl. Rep. 624.

201. WORK AND LABOR—Reasonable Value. Recovery may be had of reasonable value of work performed under supposed contract, when the minds of the parties had not met on time of payment. — Russell v. Clough, N. H., 51 Atl. Rep. 632.